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CONTENTS

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INTRODUCTORY STATEMENT.

As this August number was unavoidably delayed in its appearance, certain items which have appeared since August have been included in it because of their current interest.—Ed.

Entered as Second-Class Matter at the Post Office at Boston.

DECLARATORY AND INTERPRETATIVE JUDGMENTS IN MASSACHUSETTS.

By Henry T. Lummus.

The New Massachusetts Statute.

The new Massachusetts statute (St. 1929 c. 186) reads as follows:

> § 1. Section 3 of Chapter 213 of the General Laws is hereby amended by adding after clause "Tenth" the following new clause: Tenth A, Providing that an action at law or a suit in equity shall not be open to objection on the ground that a mere judgment, order or decree interpreting a written instrument or written instruments is sought thereby, and providing procedure under which the court may make binding determinations of right interpreting the same, whether any consequential judgment or relief is or could be claimed or not, providing that nothing contained herein shall be construed to authorize the change, extension or alteration of the law regulating the method of obtaining service on, or jurisdiction over, parties or to affect their right to jury trial.
>
> § 2. This Act shall become operative on September first of the current year.

The New Rule of the Superior Court.

The Superior Court, on October 5, 1929, adopted the following new rule, to take effect November 1, 1929:

Rule as to Procedure for the Interpretation of Written Instruments.

(A) A suit in equity shall not be open to objection on the ground that a mere determination of right, interpreting a written instrument or written instruments, is sought thereby, and the court may enter an order or decree making such determination, whether any consequential relief could be claimed or not; and if, pending the suit, a right to consequential relief, legal or equitable, accrues, such relief may be granted upon an amendment to the bill.

(B) In an action at law or suit in equity, brought to obtain a judgment or other relief, whether such judgment or relief is granted or not, the court may make a binding determination of right, interpreting any written instrument or written instruments involved in the action or suit, upon application of any party made in his declaration, bill, petition or answer.

(C) The practice in actions and suits for determination of

right shall follow as nearly as may be the practice in other actions at law or suits in equity, as the case may be. Where jury trial is claimed as provided in G. L. c. 231 §60 and Equity Rule 30, any disputed question of fact shall be tried by a jury, upon issues framed or otherwise, unless it appears that the determination sought could not affect existing or future proceedings in which the party claiming jury trial could have jury trial as of right. Where a judgment or other relief is sought in an action or suit, the costs shall not be affected by the making or refusal of any determination of right; but in a suit for a determination of right only, costs shall be as in other cases in equity.

(D) If, in the opinion of the court, the parties should be remitted to some other form of procedure, or for other reasons, the court may decline to make a determination of right, stating the reasons therefor.

HISTORICAL NOTE.

A common law action of contract or tort can be based only on a legal wrong accomplished and complete at the beginning of the suit. *Daniels* v. *Newton*, 114 Mass. 530. *Parker* v. *Russell*, 133 Mass. 74. *Krasnow* v. *Krasnow*, 253 Mass. 528. *DeNuccio* v. *Caponigro*, 259 Mass. 365. *Goldstein* v. *Ziman*, 259 Mass. 430. 33 C. J. 1097. In equity, while a merely threatened wrong may create a right to equitable preventive relief, the general rule is, that to maintain a bill, the right to equitable relief must be complete when the bill is filed. *Bernard* v. *Toplitz*, 160 Mass. 162. *Bartlett* v. *New York, New Haven & Hartford Railroad*, 226 Mass. 467. *Cobb* v. *Library Bureau*, 260 Mass. 7, 14. *Collins* v. *Snow*, 218 Mass. 542, 545. *Wappler* v. *Woodbury Co.*, 246 N. Y. 152.

Furthermore, at common law a judgment is always followed by process to carry it into effect. *Gordon* v. *United States*, 117 U. S. 697, 702. Likewise, in equity "where all that is sought by a plaintiff is a declaratory decree not the subject of relief to be based upon it, there is no jurisdiction in equity and the bill must be dismissed." *Hanson* v. *Griswold*, 221 Mass. 228, 234. *Pogrotsky* v. *Levatinsky*, 218 Mass. 116. *Willing* v. *Chicago Auditorium Association*, 277 U. S. 274. But in Massachusetts in special cases the court in equity has entered declaratory decrees without further relief, not only where further relief was possible (*Baylies* v. *Payson*, 5 Allen 473; *Greene* v. *Canny*, 137 Mass. 64, 70), but also where it was impossible, (*Corkum* v. *Clark*, 263 Mass. 378); and in *Guaranty*

Trust Co. v. *Hannay & Co.* (1915) 2 K. B. 536, 567–568 s. c. 12 A. L. R. 1, 17–18, the court declared that there never was any want of jurisdiction in equity, in the true sense, to make declaratory decrees.

A need has long been felt for some method of determining the conflicting rights of parties to contracts, and other persons in dispute as to their rights, so that they may then act in accordance with their rights as judicially determined, without requiring one of them first to do some act which, if his contention shall prove to be erroneous, will constitute a legal wrong and subject him to legal liability. See *Societe Maritime* v. *Venus Steam Shipping Co.*, 9 Commercial Cases (1904) 289.

This was agitated for some years in Massachusetts, prior to the enactment of St. 1929 c. 186. See Second Report of the Judicature Commission (1921), 113 *et seq.* First Report of the Judicial Council (1925), 33 *et seq.* Second Report of the Judicial Council (1926), 68. Third Report of the Judicial Council (1927), 65 *et seq.* Fourth Report of the Judicial Council (1928), 49. Report of Subcommittee of Massachusetts Bar Association on Declaratory Judgments (1923), 8 Mass. Law Quarterly (Feb., 1923), 61. Much periodical literature has dealt with the subject, the most valuable being the notes in 12 A. L. R. 52, 19 A. L. R. 1124 and 50 A. L. R. 42, the article by Mr. Justice Riddell on the Canadian law in 25 Law Notes (Edward Thompson Co. Northport, L. I., June, 1921) 46, and the articles by Prof. Edwin M. Borchard of Yale in 34 Harvard Law Review (May, 1921) 697, 28 Yale Law Journal (Nov. & Dec., 1918) 1, 105, and 14 American Bar Association Journal (Dec., 1928) 633.

Objection has been made to laws authorizing declaratory judgments on the constitutional ground that they impose non-judicial duties upon the judiciary. See Massachusetts Declaration of Rights, Art. 30. *Boston* v. *Chelsea*, 212 Mass. 127. But by the great weight of authority, proceedings may be judicial though not cast in any of the moulds familiar to the framers of the Constitution; and laws providing for declaratory judgments and decrees, without requiring an existing or threatened legal wrong as a necessary basis, or any process of enforcement as a necessary consequence, do not violate the constitution by imposing non-judicial duties upon the court. *Kariher's Petition (No. 1)*, 284 Pa. 455. *Braman* v. *Babcock*, 98 Conn. 549. *McCrory Stores Corp.* v. *S. M. Braunstein Inc.*, 102 N. J. L. 590. *Contra, Anway* v. *Grand Rapids*

Railway Co., 211 Mich. 592 s. c. 12 A. L. R. 26. The case of *Willing* v. *Chicago Auditorium Association*, 277 U. S. 274, declares by majority opinion, merely that a proceeding for a purely declaratory judgment or decree presents no "case" or "controversy" within the grant of judicial power in the Federal constitution, and consequently cannot be brought in, or removed to, a federal court. See *Fidelity National Bank* v. *Swope*, 274 U. S. 123. For discussion of the Willing case see 14 American Bar Association Journal (Rec. 1928), 633. 13 Mass. Law Quart. (May, 1928) 52. Cf. *In re Gilbert*, 276 U. S. 294. *Liberty Warehouse Co.* v. *Grannis*, 273 U. S. 70.

Declaratory judgments and decrees are not wholly a novelty in our law. Bills of peace lie in equity to settle a general right between a single party on one side, and numerous persons claiming distinct and individual interests dependent on that general right, on the other side. Pomeroy Eq. Jur. §243 *et seq.* Cf. *Hale* v. *Allinson*, 188 U. S. 56. *Spear* v. *H. V. Greene Co.*, 246 Mass. 259. *Rogers* v. *Boston Club*, 205 Mass. 261. Furthermore, bills of peace, called bills to quiet title or to remove cloud on title, lie in favor of persons in possession of property to settle the title thereto against claimants who will not bring suit or who bring suits which will not determine the title. *Clouston* v. *Shearer*, 99 Mass. 209. *Sherman* v. *Fitch*, 98 Mass. 59. *First Baptist Church of Sharon* v. *Harper*, 191 Mass. 196, 209. *McArthur* v. *Hood Rubber Co.*, 221 Mass. 372. *Sharon* v. *Tucker*, 144 U. S. 533. Bills for instructions, analogous to bills of interpleader, may be brought, not by beneficiaries, but by trustees, executors and administrators (*Welch* v. *Adams*, 152 Mass. 71. *McAllister* v. *Elliot*, 83 N. H. 225. *Ackerman* v. *Union & New Haven Trust Co.*, 90 Conn. 63, 70), to settle the construction of the instrument under which they act, and their duties under it; but not as to matters on which they have already acted (*Hill* v. *Moors*, 224 Mass. 163), nor as to matters concerning which they have no duty (*Hyde* v. *Wason*, 131 Mass. 450. *Hill* v. *Moors*, 224 Mass. 163, 165), nor as to matters concerning which their duty is future or contingent (*New England Trust Co.* v. *Morse*, 243 Mass. 39, 47. *Old Colony Trust Co.* v. *Treasurer and Receiver General*, 243 Mass. 543, 547. *Swift* v. *Crocker*, 262 Mass. 321, 328), nor as to matters concerning which no dispute is likely. *Quincy* v. *Attorney General*, 160 Mass. 431, 437. In *Corkum* v. *Clark*, 263 Mass. 378, a declaratory decree was entered establishing the matrimonial status of the parties with reference to a deceased man, al-

though no relief was possible. Cf. *Baumann* v. *Baumann*, 250 N. Y. 382. *Dodge* v. *Campbell*, 223 App. Div. 471 s. c. 228 N. Y. S. 618.

It may be said that the foregoing are instances of equitable causes of action, theoretically if not actually recognized at the time of the adoption of the constitution. But there are other declaratory judgments and decrees, authorized by later statutes which must be declared unconstitutional unless the legislature has power to provide for declaratory proceedings. A familiar class consists of decrees registering the title to land, G. L. c. 185 § 45. *Tyler* v. *Judges of the Court of Registration*, 175 Mass. 71. *Hollingsworth & Vose Co.* v. *Recorder of the Land Court*, 262 Mass. 45. *Malaguti* v. *Rosen*, 262 Mass. 555. Another consists of decrees of the land court determining the validity of certain incumbrances, under G. L. c. 240 §§11–14. *McArthur* v. *Hood Rubber Co.*, 221 Mass. 372. Another consists of decrees of the land court establishing the right to act under a power, G. L. c. 240 §§ 27, 28. Another consists of decrees of nullity or validity of marriage under G. L. c. 207 §14. Still another consists of decisions establishing claims against the Commonwealth, against which no execution lies. G. L. c. 258 §3.

The Uniform Declaratory Judgments Act, in seventeen sections, was approved by the National Conference of Commissioners on Uniform State Laws on August 5, 1922, and may be found in the Handbook of that conference for 1922, page 241, and in 9 Uniform Laws Annotated, 87. The scope of the act is indicated by the first section, which reads as follows: "Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declaration shall have the force and effect of a final judgment or decree." This act is discussed by Prof. Edwin M. Borchard of Yale in 34 Harvard Law Review (May, 1921) 697, and by Messrs. Farabaugh and Arnold in 3 Indiana Law Journal (Feb. & March, 1928) 351, 444. It has been adopted, either verbatim or with some changes, in Arizona (Laws 1927 c. 10); Colorado (Laws 1923 c. 98); Hawaii (Revised Laws, 1925, §§2918–2923); Indiana (Acts 1927 c. 81); Kansas (Rev. Stat. Annotated, 1923, 60–3127 to 60–3132); Kentucky (Acts 1922 c. 83; Carroll's Codes of Practice 7th Ed., 1927, §§639 a-1 to 639 a-12); New Jersey (Laws

1924 c. 140; Cum. Supp. to Comp. Stat., 1911–1924, 163–351 to 163–366); Michigan (Laws 1929, Enrolled Act No. 23; but see *Anway* v. *Grand Rapids Railway Co.*, 211 Mich. 592 s. c. 12 A. L. R. 26); Nebraska (Sess. Laws 1929 c. 75); Nevada (Stat. 1929 c. 22); North Dakota (Laws 1923 c. 237; Supp. to 1913 Comp. Laws, 1913–1925, 7712a–1 to 7712a–16); Oregon (Laws 1927 c. 300; 1927 Supp. to Oregon Laws Anno. Title 5 §§1–16); Pennsylvania (Act of 1923, June 18, P. L. 840; 1928 Cum. Supp. to Digest of Penn. Stat. Law, 1920, §§12805a–1 to 12805a–16); South Dakota (Laws 1925 c. 214); Tennessee (Laws 1923 c. 29; Supp. to Shannon's Anno. Code of 1917, 1917–1925, §§4726a–1 to 4726a–16); Utah (Laws 1925 c. 24); Virginia (Gen. Laws, 1923, c. 257A, §§ 6163–1 to 6163–8); Wisconsin (Laws 1927 c. 212); and Wyoming (Laws 1923 c. 50). The act is very wide in its scope, and in some states has been used freely for the determination of questions of constitutionality. *Erwin Billiard Parlor* v. *Buckner*, 156 Tenn. 278. *Cummings* v. *Shipp*, 156 Tenn. 595. *Goetz* v. *Smith*, 152 Tenn. 451. *Utah State Fair Ass'n* v. *Green*, 68 Utah 251. *Lagoon Jockey Club* v. *Davis County*, Utah s. c. 270 Pac. 543. Cf. *In re Freeholders of Hudson County*, N. J. L. s. c. 143 Atl. 536. In New Jersey, where there are separate courts for law and equity, the words "within their respective jurisdictions" have been held to deprive the equity court of power to declare rights recognized at law; and thus proceedings for declarations have been limited almost wholly to the law courts, for there are few rights recognized only in equity. *Paterson* v. *Currier*, 98 N. J. Eq. 48. *Wight* v. *Board of Education*, 99 N. J. Eq. 843. *Union Trust Co.* v. *Georke Co.*, N. J. Eq. s. c. 142 Atl. 560.

Connecticut (Acts 1921 c. 258) and New York (Laws 1920 c. 925, the Civil Practice Act § 473; Gilbert-Bliss Civil Practice Act Anno., 1926, Book 4, § 473; Cahill's New York Civil Practice, 5th Ed. 1928, § 473), have almost identical acts, providing that the superior court in Connecticut and the supreme court in New York "shall have power in any action or proceeding to declare rights and other legal relations on request for such declaration whether or not further relief is or could be claimed, and such declaration shall have the force of a final judgment", and giving the court power to make rules for carrying the act into effect. The Connecticut rules are found in *Braman* v. *Babcock*, 98 Conn. 549, 552, and the New York rules in Gilbert-Bliss Civil Practice Act, Anno., 1926, Book 10, Rules 210 to 214, Page 184, or in Cahill's New York Civil Practice, 5th Ed. 1928, Rules 210 to 214, Page 565.

In California (St. 1921 page 689; Code of Civil Procedure, 1923 Ed., §§ 1060–1062), Florida (Comp. Gen. Laws, 1927, § 4953, 4594) and South Carolina (Acts 1922 No. 542) the statutes, like the Massachusetts statute, generally limit declarations to the construction of written instruments; though the California act is somewhat broader. The Florida act is very like that of Massachusetts, though it takes effect of its own force and not by virtue of subsequent rule. Under that act it has been held, that a declaration may be made as to the construction of a tax deed but not as to the validity of the antecedent proceedings. *Stuart* v. *Stephanus,* 94 Fla. 1097.

Rhode Island has not only an ineffective statute based on the English act of 1852 (Gen. Laws, 1923, c. 339 § 19), but also a provision for declaration of right upon a case stated by the concurrence of the parties. Gen. Laws, 1923, c. 339 §20. *Guild for an Opinion,* 28 R. I. 88.

The English law originated in Stat. 15 & 16 Vict. c. 86, (1852), an act to amend the practice and course of proceedings in the High Court of Chancery, §50 of which reads as follows: "No suit in the said court shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the court to make binding declarations of right without granting consequential relief." This statute was narrowly (*Cox* v. *Barker,* 3 Ch. D. 359, 370) construed to mean that a declaratory judgment could not be given unless consequential relief could have been given or claimed. *Jackson* v. *Turnley,* 1 Dr. 617. *Rooke* v. *Lord Kensington,* 2 K. & J. 753, 761, 762 (1856). *Hanley* v. *Wetmore,* 15 R. I. 386, construing the similar Rhode Island statute, Gen. Laws, 1923, c. 339 §19.

By the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49) the act of 1852 was repealed, and the way cleared for the Rule Committee to prescribe the practice. *Guaranty Trust Co. of New York* v. *Hannay & Co.* (1915) 2 K. B. 536 s. c. 12 A. L. R. 1. In 1883, Order 25, Rule 5 was made, now found with notes in The Annual Practice, 1929, page 422. It reads: "No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed, or not." This rule made a radical change in the old law, and permitted a declaration of right in a case where other relief is impossible. *Guaranty Trust Co. of*

New York v. *Hannay & Co.*, (1915) 2 K. B. 536 s. c. 12 A. L. R. 1. The power under this rule is limited only by the discretion of the court. *Hanson* v. *Radcliffe Urban Council*, (1922) 2 Ch. 490, 507.

In 1893, Order 54A, Rule 1 (The Annual Practice, 1929, page 1031) was adopted. It reads: "In any division of the High Court, any person claiming to be interested under a deed, will, or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested." This "deals only with procedure" (*In re Staples; Owen* v. *Owen*, (1916) 1 Ch. 322, 327) and is explained in The Annual Practice, 1929, page 1031, in these words: "The provisions of this order vest in every division of the High Court the power of determining on originating summons questions of construction, which under R. S. C. 1883 was confined (so far as they relate to express trusts or the administration of the estate of a deceased person) to the Chancery Division."

NOTE ON THE STATUTE.

It will be noticed that the Massachusetts act (a) takes effect, not of its own force, but only by subsequent rule of the Supreme Judicial Court, of the Superior Court, or of each, G. L. c. 213, §3 providing that "the rules of the Superior Court shall not conflict with those of the Supreme Judicial Court"; and (b) limits the power of the court to determinations of right interpreting written instruments. The words "written instrument" include "any written document under which any right or liability, whether legal or equitable, exists." *Mason* v. *Schuppisser*, 81 Law Times Rep. (1899) 147. The Massachusetts law is much the same as the English law would be if Order 25, Rule 5, were limited, as it is not, by Order 54A, Rule 1.

It may reasonably be expected that the Massachusetts act will be used to obtain an interpretation of deeds, leases (*Fidelity & Columbia Trust Co.* v. *Levin*, 221 N. Y. S. 269, s. c. 128 Misc. 838. *West* v. *Gwynne*, (1911) 2 Ch. 1. *Ideal Film Renting Co., Ltd.* v. *Nielsen*, (1921) 1 Ch. 575. *Leibowitz* v. *Bickford's Lunch System*, 241 N. Y. 489. *Girard Trust Co.* v. *Tremblay Motor Co.*, 291 Pa. 507. *Aaron* v. *Woodcock*, 283 Pa. 33, s. c. 38 A. L. R. 1251. 38 Yale Law Journal (Dec., 1928) 241), wills (*Blackwell* v. *Blackwell*, (1929) A. C. 318. *In re Forrest*, (1916) 2 Ch. 386), long-term contracts (*Palace Shipping Co., Ltd.* v. *Gans Steamship Line*, (1916)

1 K. B. 138. *Societe Maritime* v. *Venus Steam Shipping Co.* 9 Commercial Cases (1904) 289), and the constitution and by-laws of corporations, fraternal orders and voluntary associations generally. *In re National Union of Seamen; Wilson* v. *National Union of Seamen,* (1929) 1 Ch. 216. *Oram* v. *Hutt,* (1914) 1 Ch. 98. *Cyclists' Touring Club* v. *Hopkinson,* (1910) 1 Ch. 179. *Collins* v. *Sedgwick,* (1917) 1 Ch. 179. *Hopkinson* v. *Mortimer, Harley & Co., Ltd.* (1917) 1 Ch. 646. *Morgan's Brewery Co.* v. *Crosskill,* (1902) 1 Ch. 898. *In re William Thomas & Co., Ltd.* (1915) 1 Ch. 325. *Ewling* v. *Israel & Oppenheimer,* 118 L. T. Rep. (N. S.) 99. *Grainger* v. *Order,* 31 Ontario L. R. 461. *In re Amalgamated Society; Addison* v. *Pilcher,* (1910) 2 Ch. 547. *United Order of Foresters* v. *Miller,* 178 Wis. 299. *Cope* v. *Crossingham,* (1909) 2 Ch. 148.

NOTE ON THE NEW RULE.

While the statute contemplates rules for determinations of right in actions at law and suits in equity, the procedure in equity is better adapted to the case of a suit for a determination of right only, without relief. It seems best to confine the jurisdiction at law to ancillary determinations of right in actions for legal relief.

Where, pending a suit in equity for a determination of right only, a right to consequential relief arises, whether legal or equitable, it is consonant with the equitable principle of completeness of relief to grant the relief in the same suit. *E. Kronman, Inc.* v. *Bunn Bros., Inc.,* 258 Mass. 562. *Collins* v. *Snow,* 218 Mass. 542. *Cobb* v. *Library Bureau,* 260 Mass. 7, 14. *Allen* v. *Carsted Realty Corp.,* 231 N. Y. S. 585, s. c. 133 Misc. 359.

Ordinarily an application for the construction of an instrument should set out the instrument in full. *Putnam* v. *Collamore,* 109 Mass. 509, 513.

If the defendant in a suit in equity for a determination of right only, desires relief or a determination of right upon the same or a related matter, he may insert in his answer a counterclaim asking such relief or determination, under Equity Rule 6. See *Verner-Jeffreys* v. *Pinto,* (1929) 1 Ch. 401.

Costs are discretionary in equity (G. L. c. 261, §13), but in actions at law involving determinations of right it was thought best not to have the granting or refusal of the determination interfere with the award of costs. See *West* v. *Gwynne,* (1911) 2 Ch. 1. *Grant* v. *Knaresborough Urban District Council,* (1928) W. N. 28.

The statute provides that the rules adopted shall not affect the

"right" of the parties to "jury trial." It seems best not to refine upon these words, but to give a right to jury trial pretty generally, since the determination may affect future litigation at law in which a jury trial might be had as of right. Ordinarily jury issues should be framed, but there may be cases where a determination may be made by inference from a general verdict.*

The occasions for jury trial where only the interpretation of a written instrument is concerned may be few. But, in the first place, a question of fact may exist, as to whether the writing is final and definitive as to a particular subject, or leaves something to an oral arrangement. Wigmore Evid., §2431, *et seq.* *Glackin* v. *Bennett*, 226 Mass. 316. *Spevack* v. *Budish*, 238 Mass. 215. *Western Newspaper Union* v. *Dittemore*, 264 Mass. 74. *Durkin* v. *Cobleigh*, 156 Mass. 108. *Davis* v. *Cress*, 214 Mass. 379. *Lyman B. Brooks Co.* v. *Wilson*, 218 Mass. 205. *Blanchard Lumber Co.* v. *Maher*, 250 Mass. 159. *Bresky* v. *Rosenberg*, 256 Mass. 66. *Williams* v. *Pittsfield Lime & Stone Co.*, 258 Mass. 65, 68. Again, having a written instrument to interpret, various questions of fact may arise in its interpretation, upon which a jury trial is possible. In *Nicholls* v. *Nicholls*, 81 Law Times Rep. (1899) 811, a case very like *Gorton-Pew Fisheries Co.* v. *Tolman*, 210 Mass. 402, the question arose whether a contract of partition whereby the plaintiff was to receive a certain house gave him a right of way, theretofore used with the house, over adjoining land of the defendant; and the court held that jurisdiction to construe includes jurisdiction to determine questions of fact incident to construction. Written instruments cannot be construed in a vacuum. The words take color and meaning from the circumstances under which they were employed, and those circumstances must be proved as facts. Wigmore Evid., §§2470, 2472. *W. R. Grace & Co.* v. *National Wholesale Co.*, 251 Mass. 251. *Butler* v. *Prussian*, 252 Mass. 265. *George* v. *George*, 186 Mass. 75. *Polsey* v. *Newton*, 199 Mass. 450, 453. *Kingman* v. *New Bedford Home for Aged*, 237 Mass. 323. *In re Smalley: Smalley* v. *Scotton*, (1929) 1 Ch. 112, a case like *Pastene* v. *Bonini*, 166 Mass. 85. Furthermore, when the words are ambiguous or equivocal, the construction adopted by the parties orally (Wigmore Evid., §2461, *et seq.* *Stoops* v. *Smith*, 100 Mass. 63. *Hebb* v. *Welsh*, 185 Mass. 335. *Smith* v. *Vose & Sons Piano Co.*, 194 Mass. 193. *Jennings* v. *Puffer*, 203 Mass. 534. *Nelson* v. *Hamlin*, 258 Mass. 331, 340. *Pacific Surety Co.* v. *Toye*, 224 Mass. 98. *Butman* v. *American Tract Society*, 9 Allen 447) or by their acts of practical construction (*New*

* See Smith v. Faulkner, 12 Gray, 251, 256.

York Central Railroad Co. v. *Stoneman,* 233 Mass. 258, s. c. 236 Mass. 81. *Pittsfield Railroad Corp.* v. *Boston & Albany Railroad Co.,* 260 Mass. 390) or presumably because of the existence of usage or custom (*Menage* v. *Rosenthal,* 175 Mass. 358. *A. J. Tower Co.* v. *Southern Pacific Co.,* 184 Mass. 472. *Remington* v. *Pattison,* Mass. s. c. 1928 A. S. 1495) may be proved as a fact. Likewise, when some word or phrase in the contract has a special sense in which it may be used, because of a code or a trade meaning, the meaning intended becomes a question of fact to be proved by testimony. Wigmore Evid., §2463. *Mooney* v. *Howard Ins. Co.,* 138 Mass. 375. *Selectmen of Natick* v. *Boston & Albany Railroad Co.,* 210 Mass. 229, 232. *New England M. & W. Co.* v. *Standard Worsted Co.,* 165 Mass. 328, 332. Finally, the rights of the parties under the contract often depend upon the happening of certain subsequent events, and in such cases the determination of the facts necessary for the application of the contract to such events is a part of the construction and interpretation of the contract. *Taylor* v. *Yielding,* 56 Sol. Jour. (1912) 253. See also *Palace Shipping Co., Ltd.* v. *Gans Steamship Line,* (1916) 1 K. B. 138. *In re Forrest,* (1916) 2 Ch. 386. *In re May: Eggar* v. *May,* (1917) 2 Ch. 126.

Practically all statutes and rules for declaratory judgments make the entering of such a judgment a matter of judicial discretion. Uniform Declaratory Judgments Act, §6. *Kariher's Petition (No. 1),* 284 Pa. 455, 471. Connecticut Superior Court Rule 63 (98 Conn. 552). New York Supreme Court Rule 212. *Bareham* v. *City of Rochester,* 246 N. Y. 140, 143. Cf. *Westchester Mortgage Co.* v. *G. R. & I. R. R. Co.,* 246 N. Y. 194, 199. *Ufa Films* v. *Ufa Eastern Division Distribution,* 234 N. Y. S. 147. Surely it is within the power of the Superior Court in Massachusetts to make the matter discretionary, where the statute does not create the jurisdiction by its own force. The exercise of power under the English rule has always been held to be discretionary. *Ackerman* v. *Union & New Haven Trust Co.,* 91 Conn. 500, 507. *Dyson* v. *Attorney General,* (1911) 1 K. B. 410, 417. *Hanson* v. *Radcliffe Urban Council,* (1922) 2 Ch. 490, 507. *Guaranty Trust Co. of New York* v. *Hannay & Co.,* (1915) 2 K. B. 536, 565, 567, s. c. 12 A. L. R. 1, 19, 20.

It ought to be discretionary. As Lord Sterndale said in *Gray* v. *Spyer,* (1922) 2 Ch. 22, 27, "Claims for declaration should be carefully watched. Properly used, they are very useful; improperly used, they almost amount to a nuisance." See also Lord Finlay in

Russian Commercial & Industrial Bank v. *British Bank for Foreign Trade, Ltd.*, (1921) 2 A. C. 438, 445, s. c. 19 A. L. R. 1101, 1104. It seems better to let the practice governing the discretion of the court grow with experience, and not to try to confine the court within predetermined bounds.

In other jurisdictions in which declaratory judgments are known, certain principles governing the exercise of judicial discretion have been developed. In general, a declaration of rights will not be made in the following cases:

(1) Where the declaration is sought concerning the title to property situated in another jurisdiction, the law of which governs, and the courts of which must ultimately be resorted to for relief. *Westchester Mortgage Co.* v. *G. R. & I. R. R. Co.*, 246 N. Y. 194. *Braman* v. *Babcock*, 98 Conn. 549. *Everhart* v. *Provident Life & Trust Co.*, 195 N. Y. S. 388, s. c. 118 Misc. 852.

(2) Where the subject matter of the declaration sought is confided exclusively to the jurisdiction of a special tribunal. *Barraclough* v. *Brown*, (1897) A. C. 615. *Baron Reitzes de Marienwert* v. *Administrator of Austrian Property*, (1924) 2 Ch. 282. *Bull* v. *Attorney General*, (1916) 2 A. C. 564. *Flint* v. *Attorney General*, (1918) 1 Ch. 216. *Moore* v. *Louisville Hydro-Elec. Co.*, 226 Ky. 20 (workman's compensation right). *N. Y. & Ottawa R. W. Co.* v. *Township of Cornwall*, 29 Ont. L. R. 522. *Ottawa Young Men's Christian Association* v. *City of Ottawa*, 29 Ont. L. R. 574. Cf. *Simmonds* v. *Newport Abercarn Black Vein Steam Coal Co., Ltd.*, (1921) 1 K. B. 616.

(3) Where the declaration is sought in connection with a claim for relief which fails on the ground of a lack of obligation between the parties, rendering a declaration immaterial (*Hammerton* v. *Dysart*, (1916) 1 A. C. 57, modifying (1914) 1 Ch. 822, declaration as to plaintiff's ferry franchise refused where the defendant's ferry did not infringe: *City of Windsor* v. *Canadian Pacific Ry. Co.*, 54 Ont. L. R. 222; *Trustees of Columbia University* v. *Kalvin*, 235 N. Y. S. 4); but where the refusal of relief is not based on any lack of right or obligation between the parties a declaration may be made though relief is refused. *Llandudno Urban District Council* v. *Woods*, (1899) 2 Ch. 705 (injunction refused, declaration granted, where invasion of plaintiff's right was trivial). *Islington Vestry* v. *Hornsey Urban District Council*, (1900) 1 Ch. 695. *London Association* v. *London and India Docks Joint Committee*, (1892) 3 Ch. 242. *Miller* v. *E. & M. Theatre Corp.*, 235 N. Y. S. 595.

(4) Where the transaction is not a continuing one, but closed, and an action for relief would settle the entire controversy, leaving no useful purpose to be served by a declaration; and this, no matter whether the relief can be awarded in the same case in which the declaration is sought, or in another pending case (*List's Estate,* 283 Pa. 255. *Leafgreen* v. *LaBar,* 293 Pa. 263. *Ladner* v. *Siegel,* 294 Pa. 368. *Proctor* v. *Avondale Heights Co.,* 200 Ky. 447) or in a case which the party seeking the declaration may bring if he chooses (*Loesch* v. *Manhattan Life Ins. Co.,* 218 N. Y. S. 412, s. c. 128 Misc. 232. *Kaleikau* v. *Hall,* 27 Hawaii 420. *Kaaa* v. *Waiakea Mill Co.,* 29 Hawaii 122) or in a case which the opposite party delays bringing, exercising his right to wait during the period allowed by the statute of limitations. *North Eastern Marine Engineering Co.* v. *Leeds Forge Co.,* (1906) 1 Ch. 324 affirmed (1906) 2 Ch. 498. *Dyson* v. *Attorney General,* (1911) 1 K. B. 410, 417. *Guaranty Trust Co. of New York* v. *Hannay & Co.,* (1915) 2 K. B. 536, s. c. 12 A. L. R. 1. *In re Clay: Clay* v. *Booth,* (1919) 1 Ch. 66. *Brooking* v. *Mandalay, Son & Field,* 38 Ch. D. 636. But a declaration will not be refused merely because, pending the suit, a right to relief which would settle the controversy has developed. *Allen* v. *Carsted Realty Corp.,* 231 N. Y. S. 585, s. c. 133 Misc. 359.

(5) Where a declaration similar to that sought can be obtained in a proceeding under pre-existing laws. *West* v. *Lord Sackville,* (1903) 2 Ch. 378 (declaration as to legitimacy). *Everett* v. *Griffiths,* (1924) 1 K. B. 941. *McCalmont* v. *McCalmont,* 93 Pa. Superior Court 203 (nullity of marriage). *Ladner* v. *Siegel,* 294 Pa. 368, 373.

(6) Where the declaration is sought as to a fragment only of the controversy, and would not be decisive of the rights of the parties. *Lewis* v. *Green,* (1905) 2 Ch. 340. *Harrowby* v. *Leicester Corporation,* 85 L. J. Ch. (1915) 150. Lords Finlay and Wrenbury, dissenting, in *Russian Commercial & Industrial Bank* v. *British Bank for Foreign Trade, Ltd.,* (1921) 2 A. C. 438, 446, 458, 460, *et seq.,* s. c. 19 A. L. R. 1101, 1104, 1113, *et seq. In re Amalgamated Society: Addison* v. *Pilcher,* (1910) 2 Ch. 547.

(7) Where the declaration relates to future rights or interests, especially where they are contingent or all the persons interested are not of full age and before the court. *In re Staples: Owen* v. *Owen,* (1916) 1 Ch. 322. *Tanner* v. *Boynton Lumber Co.,* 98 N. J. L. 85. *Ackerman* v. *Union and New Haven Trust Co.,* 91 Conn. 500. *Denver* v. *Denver Land Co.,* Colo., s. c. 274 Pac. 473. *Kariher's Petition*

(No. 1), 284 Pa. 455; 472. *Lyman* v. *Lyman*, 293 Pa. 490. *Ladner* v. *Siegel*, 294 Pa. 368. *In re Gooding's Will*, 208 N. Y. S. 793, s. c. 124 Misc. 400. *Bunnell* v. *Gordon*, 20 Ont. 281.

(8) Where the declaration, though not an adjudication of the rights of persons not before the court, would practically have its chief effect as a precedent against such persons upon the construction of the same instrument, or would amount to a mere advisory opinion. *Reese* v. *Adamson*, 297 Pa. 13. *Revis* v. *Daugherty*, 215 Ky. 823. *Adams* v. *Slavin*, 225 Ky. 135, 141. *Savin* v. *Delaney*, 229 Ky. 226. *Hayden Plan Co.* v. *Wood*, Cal. App. s. c. 275 Pac. 248. *Hayden Plan Co.* v. *Friedlander*, Cal. App. s. c. 275 Pac. 253. Cf. *Morgan's Brewery Co.* v. *Crosskill*, (1902) 1 Ch. 898. See also *Sullivan* v. *Secretary of the Commonwealth*, 233 Mass. 543. *Independent-Progressive Party* v. *Secretary of the Commonwealth*, Mass. s. c. 1929 A. S. 231.

(9) Where there is between the parties a mere possibility of dispute, and no existing or obviously impending one. *In re Clay: Clay* v. *Booth*, (1919) 1 Ch. 66. *Kariher's Petition (No. 1)* 284 Pa. 455, 471. *Lyman* v. *Lyman*, 293 Pa. 490. *Ladner* v. *Siegel*, 294 Pa. 368. *Reese* v. *Adamson*, 297 Pa. 13. *Mulcahy* v. *Johnson*, 80 Colo. 499. *Gabriel* v. *Board of Regents*, 83 Colo. 582. *Denver* v. *Denver Land Co., Colo.*, s. c. 274 Pac. 473. *Tanner* v. *Boynton Lumber Co.*, 98 N. J. L. 85. *Williams* v. *Flood*, 124 Kan. 728. *Revis* v. *Daugherty*, 215 Ky. 823.

(10) Where the proceeding involves nothing more than a small sum of money. *Westbury-on-Severn Rural Sanitary Authority* v. *Meredith*, 30 Ch. D. 387 (less than £10). See also *Chapman* v. *Banker & Tradesman Publishing Co.*, 128 Mass. 478 (less than $100.). *Wilkinson* v. *Stitt*, 175 Mass. 581.

It has been held in Tennessee that where the opinion of the court is adverse to the party seeking the declaration, the proper course is to make a contrary declaration and not merely to dismiss the bill. *Frazier* v. *Chattanooga*, 156 Tenn. 346. It would be safer, however, for the opposing party to file a counterclaim, asking for the contrary declaration.

It was not deemed necessary to provide for speedy hearing of cases brought under the rule, since G. L. c. 231 §59A (St. 1922 c. 509) gives the court ample power to advance any case in its discretion.

The court, in a suit against a class of persons, will be careful, by calling a meeting or otherwise, to see that the class is properly

represented by the individuals named and served. *Morgan's Brewery Co.* v. *Crosskill,* (1902) 1 Ch. 898. It is believed that a fear of want of proper representation in such cases was the cause of the insertion in the statute of the provision as to service and jurisdiction.

EDITORIAL NOTE.

In the illuminating discussion by Judge Lummus, above printed, the following statement appears:

> "The case of *Willing* v. *Chicago Auditorium Association,* 277 U. S. 274, declares, by majority opinion, merely that a proceeding for a purely declaratory judgment or decree presents no 'case' or 'controversy' within the grant of judicial power in the Federal Constitution and consequently can not be brought in, or removed to, a Federal Court."

This majority opinion has caused much discussion, in the course of which it has been pointed out that the question before the court raised merely a point of statutory interpretation and not of constitutional interpretation. (See *XIV American Bar Association Journal, 633; XIII Massachusetts Law Quarterly, May, 1928, 52.)* Accordingly, in order to keep the attention of the bar fixed upon the strict limits of the decision in the Willing case, as distinguished from the dictum, we reprint in full the brief, but pungent, minority opinion of Mr. Justice Stone, who concurred in the decision, but declined to join in the dictum.

MR. JUSTICE STONE'S MINORITY OPINION.

I concur in the result. It suffices to say that the suit is plainly not one within the equity jurisdiction conferred by Sections 24, 28, of the Judicial Code.

But it is unnecessary, and I am therefore not prepared, to go further and say anything in support of the view that Congress may not constitutionally confer on the Federal courts jurisdiction to render declaratory judgments in cases where that form of judgment would be an appropriate remedy, or that this Court is without constitutional power to review such judgments of State courts when they involve a Federal question. Compare *Fidelity National Bank & Trust Co.* v. *Swope,* 274 U. S. 123, 130-134.

"It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a deci-

sion of the case." *Burton* v. *United States,* 196 U. S. 283, 295. See *Blair* v. *United States,* 250 U. S. 273, 279; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 177; *Light* v. *United States,* 220 U. S. 523, 538.

There is certainly no "case or controversy" before us requiring an opinion on the power of Congress to incorporate the declaratory judgment into our Federal jurisprudence.

And the determination now made seems to me very similar itself to a declaratory judgment to the effect that we could not constitutionally be authorized to give such judgments—but is, in addition, prospective, unasked, and unauthorized under any statute.

It is also interesting, as Judge Lummus points out, that while the Massachusetts court, in the statement quoted from *Hanson* v. *Griswold,* 221 Mass. at 234, appears to have doubted the jurisdiction to issue a declaratory decree where no relief could be based upon it; yet, in certain cases, the court appears to have issued declaratory decrees, without any expression of doubt, not only where further relief was possible, as in *Baylies* v. *Payson,* 5 Allen 473, and *Green* v. *Canny,* 137 Mass., but also where such further relief appears to have been impossible, as in the very recent case of *Corkum* v. *Clark,* 263 Mass. 378. Thus the Massachusetts Court appears to have recognized, by decision, the existence, without statutory authority, of the jurisdiction in certain cases, and that the exercise of this discretionary jurisdiction was a matter of practice and procedure, as decided by the English Court in *Guaranty Trust Co.* v. *Hannay.*

F. W. G.

IS A GENERAL INCOME TAX FOR MASSACHUSETTS A STEP IN THE RIGHT DIRECTION?

(The Second Report of the Special Commission on Taxation, etc., was reprinted in the supplement to the "Quarterly" for February, 1929, and certain comments upon it were printed in the "Quarterly" for May, 1929, pp. 47–49.—ED.)

The most important of the proposals of the Special Commission on Taxation which made its report last January is that which relates to the income tax. The Special Commission recommends that, in place of the income tax which has been in force in Massachusetts since 1916 and which reaches only certain specified classes of income, there be substituted a general income tax on income of all classes and graded so that the rate upon the larger incomes will be higher than upon the smaller. A substantial amount of the income of each person, it is proposed, shall be exempt altogether. Most of the public discussion in regard to this proposal has dealt with the proposed exemptions, that is, the extent of the income which a person may receive tax free. The exact amount of exemption is however a detail of minor importance and the exemption can be adjusted after due consideration and changed from time to time. The real issue to be considered is the abandonment of the present income tax and the substitution of an entirely new form of income taxation.

There are five main headings under which the proposed changes may best be considered:

(1) The taxation of the income of property itself taxed on its capital value at the same rate as the income of property not otherwise taxed.

(2) The taxation of earned income at the same rate as income from property.

(3) The inclusion in the tax of gains from the sale of real estate and tangible personal property.

(4) The change in the personal exemption.

(5) The adoption of a graded or progressive tax.

(1) *The taxation of the income of property itself taxed on its capital value at the same rate as the income of property not otherwise taxed.*

In determining whether the present income tax should be abandoned in favor of a general income tax, it is well to consider what the present income tax was intended to accomplish, and to do this necessitates going back to the time when the Constitution of Massachusetts was adopted. At that time it was believed to be one of the fundamental principles of a democratic form of government that there should be no discrimination in the levy of taxes and that all property should bear its proportionate burden. It was the universal belief that this ideal could be attained only by a comprehensive property tax levied at a uniform rate in each taxing district and imposed upon all property of every description except that of charitable, educational and religious institutions. This ideal was embodied in the constitutions of many of the original states through a requirement that taxation should be "equal and uniform". The Massachusetts constitution contained in effect the same requirement through the provision that taxation should be "proportional". Similar provisions were contained in the constitutions of most of the states admitted to the union later, and up to the middle of the last century an all-comprehensive property tax at a uniform rate was established by statute in every one of the states.

At the time when the first state constitutions were adopted, intangible property was hardly known, and wealth consisted almost wholly of real estate, ships, merchandise and domestic animals and other tangible property; but when early in the nineteenth century the corporate form of organization began to be used for banking, public service and manufacturing enterprises, and corporate stocks and bonds became a common means of investing individual wealth and at the same time an extension of the use of credit led to a great increase in notes, mortgages and other evidences of indebtedness, it seemed to the people, to the legislatures and to the courts alike that the most obvious principles of fairness and equality required the taxation of these newly introduced forms of property upon precisely the same basis that property of the classes previously known was taxed. All of the states, therefore, at first attempted to tax intangible property on its capital value at the same rate as real estate and other tangible property without regard to the fact that intangible property usually merely represents an interest in or a claim against tangible property which is itself taxed.

The attempt to apply the principle of uniformity in taxation in such a way as to include intangible property proved however a complete failure. Those whose memories run back to the years

before 1916 will remember the intolerable conditions which existed at the time when it was attempted to tax intangible property at the local rate.

The tax, if enforced, would often absorb more than half of the taxpayer's income, and public sentiment did not support a literal enforcement of the law. Some persons were unfortunate enough to have their holdings unearthed by the assessors, especially when they were disclosed in Probate Court proceedings, but most taxpayers, with greater or less difficulty and danger, by evasion and concealment, and by colorable changes of residence and secret illegal arrangements with the assessors, managed to escape the whole or the greater part of the tax. It is well to remember when finding fault with the Massachusetts income tax that these same conditions at one time existed in all of the other states and still exist in nearly half of the states at the present time.

It gradually came to be realized that the attempt to tax intangible property at the same rate as real estate and tangible personal property was not only unsound and unjust from the economic standpoint but was futile in practice, and state after state gave up the hopeless struggle. It is now generally recognized that intangible property cannot be and should not be taxed at the same rate as real estate, but that, if a reasonable tax is imposed upon intangible property, such tax will be accepted as just and can be collected and will return a substantial amount of revenue; and the majority of the states have now definitely abandoned the taxation of intangibles at the full local rate and adopted some system of taxing intangibles on a much lower basis than real estate and tangible personal property.

Some of the states which have accepted these principles in the taxation of intangibles had never adopted the constitutional requirement of uniformity and required only an amendment of their statutes; others amended their constitutions to meet the situation so as to permit a classified property tax. In most cases they adopted a tax on intangibles at a rate definitely fixed by law and expressed in mills to the dollar, the rates generally being four or five mills to the dollar, or as we would say, dollars to the thousand, in place of all other taxation on such property. In other states intangible property remained subject to taxation at the local rate but was assessed on a small percentage of its value, this percentage being fixed by statute. A few other states adopted an income tax and intangibles were taxed only on their income.

It is obvious that substantially the same result was reached whatever method was used. If we take a $1,000 5% bond as a typical intangible, it is apparent that the total annual tax upon such a bond will be the same in three states, the first of which imposes a 6% income tax, the second a three mill tax and the third a tax at the local rate based on 10% of the actual value, provided the local rate in such case is $30.00 per thousand. In each case the holder of the bond will contribute annually $3.00 in taxes, no more and no less, toward the cost of government. The method by which this tax was computed would be of minor importance.

In Massachusetts, for many years before the adoption of the income tax in 1916 the evils of the existing proportional tax were recognized and efforts were constantly made, chiefly by trustees and other owners of large amounts of taxable securities, to find some more rational form of taxation than the burdensome and unevenly enforced general property tax.

By means of the broad power of the legislature to levy excises, and the application of the principle that property reached indirectly by one form of tax might be exempted from other taxation, it was possible to work out a reasonably satisfactory method of reaching domestic corporations by an excise and exempting the personal property of such corporations and their stock in the hands of stockholders from direct taxation. Savings deposits were also reached by an excise and the deposits exempted from direct taxation, and bonds and notes secured by mortgage of taxable real estate were taxed only as an interest in real estate. But there seemed to be no constitutional method for imposing any tax on the two remaining large classes of intangibles—stocks of foreign corporations and notes and bonds not secured by mortgage of taxable real estate—other than the general property tax with its intolerable evils when applied to property of these classes.

A low flat rate tax was at first suggested, such as was then already in force in Maryland, Pennsylvania and many other states, to be applied to the classes of intangibles not reached or capable of being reached by excises but this proposition had to be given up for the time being on account of a decision of the Supreme Judicial Court in 1908, holding such a tax unconstitutional as not affording "proportional" taxation. *Opinion of the Justices,* 195 Mass. 607. Attempts were then made to strike out the word "proportional" in the state constitution so as to make a low flat rate tax on intangibles permissible, but the old prejudices were too strong and it was never

possible for such an amendment to pass two successive legislatures. In 1915 an income tax similar to the one now in force was proposed, and it was urged that it could be sustained as an excise; but the court held that an income tax was a tax on property and was not proportional if other classes of property were still taxed on capital value. *Opinion of the Justices,* 220 Mass. 613, 623. A proposed tax upon intangibles at an arbitrary proportion of their actual value was also held unconstitutional. *Opinion of the Justices,* 220 Mass. 613, 619. A registration tax, by which bonds might be exempted from direct taxation upon payment of a moderate registration fee, was actually enacted and put into force, but that too was held unconstitutional. *Perkins* v. *Westwood,* 226 Mass. 268.

Since it had proved impossible to amend the constitution by striking out the word "proportional", and no other remedy was available, those who sought relief from the existing burdensome conditions were obliged to resort to a constitutional amendment authorizing an income tax. At that time the hostility of the great mass of voters unfamiliar with the finer points of public finance against a classified property tax did not extend to a state income tax, probably because the income tax then recently enacted by the federal government was looked upon as a means of imposing a greater burden of taxation upon the wealthier classes, and the Massachusetts income tax amendment, although, unlike the federal income tax, it was designed to relieve intangible property from excessive taxation rather than to provide a new means of taxing invested wealth, was ratified by the people by an overwhelming majority, and the adoption of one of the modern methods of taxing intangibles became possible.

Since the intangibles which remained subject to taxation at the local rate and with respect to which relief was sought by the amendment to the constitution consisted, therefore, almost wholly of stocks of foreign corporations and bonds and notes not secured by mortgage of taxable real estate, and satisfactory methods of reaching all other classes of taxable property by taxes measured by capital value were in force, the income tax was limited to these two classes of intangible property. These classes of property were themselves relieved from the direct property tax as soon as the constitutional amendment of 1915 made it possible, and subjected to a tax on income at the rate of 6%. This tax, however, is recognized as a property tax differing from the ordinary property tax only in that it is measured by income instead of by the capital value of the

property. *Tax Commissioner* v. *Putnam*, 227 Mass. 522, 531. Accordingly under the present system of taxation all classes of property, tangible and intangible, are taxed either by means of the local property tax, some form of corporate excise, or by the income taxes imposed in 1916 on all classes of intangible property not taxed in some other way. While these taxes are at different rates, under none of them is any substantial amount of privately owned property exempt altogether, and no class of property is subject to more than one form of tax.

The fundamental change in the income tax recommended by the Special Commission is that the tax will no longer be confined to those classes of property which are not and cannot be constitutionally reached by any reasonable form of tax measured by capital value, but will apply to income from all sources. It will however still be the only tax levied on the intangibles now subject to income tax; while as to other classes of property it will be in addition to the tax measured by capital value. Real estate will still be subject to the familiar annual local tax based on capital value and will, if this statute is enacted, be subject to the income tax as well. The stock of Massachusetts corporations which is now taxed by an excise measured partly by capital value and partly by income will also be reached in the hands of the stockholders by a tax on the dividends. Savings bank deposits are now subject to a substantial tax which, though paid by the bank, necessarily reduces the interest paid to the depositors, and the depositors will be subjected to another tax on the interest as part of their personal income.

As to all of these classes of property the income tax will be an additional burden; but as to the intangibles now subject to the income tax it will constitute a reduction of the tax to but one-half its former rate in the case of the largest income taxpayers, and to but one-sixth in the case of those in the lower brackets. In order therefore to justify this change it should appear that at the present time owners of real estate and other property taxed in proportion to capital value are paying relatively too small a tax, and owners of stocks and bonds taxed at 6% of their income from such sources are paying relatively too large a tax.

An argument over the question whether as a matter of sound taxation policy real estate should pay a tax thirty times as great as stocks and bonds, or as at present only five or six times as great, would lead us nowhere; a more satisfactory test is to determine whether as compared with the systems in force in other states our

taxes on real estate and on intangibles respectively are relatively high or low.

Taking up first the taxation of intangibles in other jurisdictions, we find that the following twenty-one states still theoretically subject intangibles to the general property tax at the full local rate:

Arizona, Arkansas, Colorado, Florida, Georgia, Illinois, Indiana, Maine, Missouri, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oregon, South Carolina, Tennessee, Texas, Utah, West Virginia and Wyoming. Of these states, Florida and Maine have adopted constitutional provisions authorizing classified taxes on intangibles, but have not acted under them.

Of the fourteen states which have adopted low flat rate taxes on intangibles, the rate is three mills on the dollar (three dollars on the thousand) in California and Minnesota; four mills in Connecticut, Pennsylvania, Rhode Island, South Dakota and Vermont; 4½ mills in Maryland; five mills in Iowa, Kansas, Kentucky, Michigan, Nebraska and Virginia.

In Louisiana the tax of intangibles is at the local rate, but intangibles are valued at 10% of their true value, and in Montana the same system is used, but 40% of the true value is the base.

Of the eleven states which reach intangibles by means of an income tax, the rate in Delaware is from 1 to 3%; in Massachusetts 6%; in Mississippi .3%; in Missouri 1%; in New Hampshire at the local rate; in New York from 1 to 3%; North Carolina 1 to 3%; North Dakota 1 to 6%; Oklahoma from .7½ to 2%; South Carolina one-third of the Federal income tax; Wisconsin 1 to 6%. Of these states, the income tax in Delaware, Massachusetts, Mississippi, New Hampshire, New York, North Dakota and Wisconsin is the only tax on intangibles. In Missouri, North Carolina and South Carolina it is in addition to the general property tax, and in Oklahoma it is in addition to a two-mill flat rate tax on capital value.

Alabama has a registration tax of $2.50 per thousand and Michigan a like tax of $5.00; upon payment of this tax the intangibles are thereafter exempt from taxation. Idaho and Washington do not tax intangibles at all.

On the assumption that a three-mill tax on capital value is equivalent to a 6% income tax, and to a tax at the local rate at 10% of true value, it appears that of the 27 states which have gotten away from the general property tax and adopted modern methods of taxing intangibles 12, namely, Connecticut, Iowa, Kansas, Kentucky, Maryland, Montana, Nebraska, Pennsylvania, Rhode Island,

South Dakota, Vermont, and Virginia, tax intangibles more heavily than Massachusetts; 3, namely, California, Louisiana, and Minnesota tax intangibles at substantially the same rate as Massachusetts; in 4, namely, North Dakota, Oklahoma, South Dakota and Wisconsin, the maximum tax is the same as in Massachusetts, and in only 7 (including the two states which do not tax intangibles at all and the two which impose a single registration tax) namely, Alabama, Delaware, Idaho, Michigan, Mississippi, New Hampshire and New York is the tax on intangibles less than in Massachusetts.

The average rate of tax on intangibles in the 26 states other than Massachusetts which have abandoned the general property tax, using a 5% bond as the subject of comparison, is 6.69% of the income. Thus the rate of tax on intangibles in Massachusetts, while by no means the lowest, or abnormally low, is somewhat lower than the average in the states which have adopted modern low-rate systems of taxing intangibles. With respect to the states which still include intangible property among the subjects of the general property tax, it is impossible to say whether the liability to taxation that will absorb one-half of one's income, coupled with an excellent chance of escaping taxation altogether by concealment of one's holdings, is more or less burdensome than a tax of one-fifth or one-sixth as great which it is difficult or impossible to avoid. Much would depend upon the temperament of the taxpayer. It is a fact, however, that in the states which still apply the general property tax to intangibles, it is usually the large investors who seek relief by the adoption of a low-rate tax with provision for strict enforcement, just as was the case in Massachusetts, and this circumstance indicates that the general property tax even with all of its avenues of escape is considered by the owners of intangible property more burdensome than a low-rate tax with compulsory returns. We can therefore conclude that the system of taxing intangibles in Massachusetts imposes a lighter burden than the system in force in the great majority of the other states.

On the other hand there can be no doubt that real estate is taxed higher in Massachusetts than in most of the other states. While comparative tax rates mean little, because of differences in valuation, a table recently prepared by the Detroit Bureau of Governmental Research contains a careful comparison of the tax-rates in the 14 largest cities of the United States, adjusted to conform to the percentage of valuation actually used as the basis of the tax-rate.

In this table it appears that Boston has the highest adjusted tax-rate of all the cities in the country except Pittsburg; and it must be remembered that the Pittsburg rate is abnormal on account of the partial adoption of the Single Tax system in that city. Many Massachusetts cities have a higher tax-rate than Boston, and it is safe to state that the true tax-rate on real estate in Massachusetts is substantially higher than in almost every other state in the country.

The recommendation of the Special Commission therefore amounts to a proposal to reduce the taxes on intangibles which are now lower than the average throughout the country, and to increase the taxes on real estate which are now higher than almost anywhere else in this country; and this result is to be accomplished by imposing an income tax at the same rate upon the income from property already subject to a burdensome tax on its capital value and from property which pays no tax on its capital value.

(2) *The taxation of earned income at the same rate as income from property.*

The tax on "earned" incomes has been on the statute-books in Massachusetts continuously since 1646. In that year provision was made for the taxation of returns and gains received by persons engaged in arts and trades in the same proportion as the tax imposed on other men for the produce of their estates and this tax was continued in all of the tax laws of the colonial and provincial periods. This tax was kept in force after the Revolution, and income from a profession, trade or employment was taxed in each town at the same rate as the tax on the capital value of real estate and personal property.

The tax on earned income was very unequally and ineffectively enforced. As returns were not compulsory, in some towns it was ignored altogether, but more commonly persons apparently in comfortable circumstances were taxed on "personal estate and income" as large an amount as it was thought they would be willing to pay without invoking the means of evasion then so commonly practised. In a few cities a genuine effort was made to enforce the tax.

Although the primary object of the income tax act of 1916 was to provide a more equitable and practicable method of taxing intangible property than by the direct property tax at the local rate, it was deemed advisable to take over the unequally and imperfectly enforced income tax from the control of the cities and towns and convert it into a state-administered tax at a uniform rate, with

the additional requirement of compulsory returns. The average local tax-rate at that time was approximately $18 per thousand, or, as applied to income, 1.8%, and as some compensation for the burden of compulsory returns, the uniform rate established under the new administration of the law was reduced to 1.5%, where it still stands.

It is of course obvious that when earned income was taxed at the local rate, earned income was in fact taxed at a much lower rate than income from property, since in the latter case the tax was applied to capital value and, unless the annual income from a piece of property was 100% of its capital value or more, the tax on the property at its capital value would absorb a larger proportion of the income than the local rate when applied to earned income. It was not then seriously contended that such discrimination in favor of earned income was unjust or improper.

The proposal of the Special Commission is to tax earned income and income from property at the same rate. While the rate proposed is not unduly burdensome, there are sound principles which require the taxation of earned income at a lower rate than the income of property when property pays no other tax than on its income.

There is something inequitable in a law which requires, for example, that a professional man who after years of effort has reached the position where he can earn $25,000 a year, and has no other income, should pay as much tax as his neighbor who has half a million dollars invested in good 5% bonds and derives a like income of $25,000 therefrom. It is not so much that the latter acquires his income without effort as that what he owns is more valuable, since his income will in the natural course of events continue as long as he lives, and can be passed on to his heirs or devisees when he dies; whereas the income of the professional man may shrink away at any time, will probably diminish or cease when he gets old, and will certainly come to an end when he dies. The distinction may be considered from three points of view:

(1) The present value of an annual income of $25,000 of a man 55 or 60 years of age terminable on his death is nowhere near $500,000, and when the capitalized value of the income is so different, a tax on the annual return at the same rate is inequitable.

(2) The professional man is bound to put aside part of his earnings for insurance, for his own support in his old age, and for the support of his dependents when he becomes infirm or dies, and

his income is not all available for his own use; whereas the man living on the income of bonds may spend his whole income without fear of the future.

(3) A professional man's brain is a wasting asset, and in the case of income from all other forms of wasting assets a deduction for amortization is allowed. If for example a man spent $105,000 in acquiring or developing a valuable mine from which he could derive an income of $25,000 a year, and it could be foreseen that the mine would become exhausted in fifteen years, he would be allowed a deduction of one-fifteenth of the cost of the mine, or $7,000, from his gross income each year, for amortization. If however a man spent all the early years of his life in developing his mind and professional ability until at the age of fifty-five he could earn $25,000 a year, he would presumably have but fifteen years of productive work ahead of him, but he is not allowed a deduction for the amortization of his brain, and must pay on the full $25,000, and under the proposed graded system of taxation would pay nearly 60% more tax than the mine-owner who enjoyed the same income with the same expectancy of continuance.

Moreover, in actual practice, under a general income tax law at a uniform rate on all classes of income, earned income will pay a much higher tax than income from property. This has been demonstrated clearly under the federal income tax law. Persons deriving their income from their own efforts, and especially salaried and professional men, have no avenues of escape, but must pay a tax on their full net income; but in the case of income from investments the real financial increment of the owner is often not fully taxed because of exemptions and deductions, many of which do not in the least affect his ability to pay. He may invest in corporations which devote the greater part of their earnings to expansion, and the steady increase in the value of his holdings is not subject to tax; the income from government, state and municipal bonds, federal land bank bonds and many other securities is tax exempt; gains from the sale of long-held capital assets are based on the value as of the date when the law went into effect and are only partly taxed; amortization and depreciation may be based on the value as of the date when the law went into effect, which may be far in excess of cost or book value, capital losses may be taken when they will do the taxpayer the most good, and there are many other entirely legitimate methods by which the taxpayer whose income is derived from property may reduce his taxable income far below the

"gain, profit or revenue of every description" actually enjoyed by him. None of these avenues is open to the man whose income is derived from his own personal services and activities, and it is safe to say that under a general income tax, a person whose income is entirely "earned" pays on the average twice the tax of a person who has the same real income derived from his ownership of property.

Under these circumstances a tax which purports to tax "earned" income and income from property at the same rate cannot be considered equitable.

(3) *The inclusion in the tax of gains from the sale of real estate and tangible personal property.*

Prior to 1916, a gain from the sale of capital assets was not taxed in any form under the laws of Massachusetts; and, when the income tax law was originally drafted, as the law was intended to provide for the reduction and thereafter the enforcement of taxes long imperfectly and unevenly assessed, no provision for a tax on capital gains was included. When the bill was before the Legislature, a general desire to reach the large fortunes which were then being made in the stock speculation which followed the outbreak of the World War led to the insertion of a provision for the taxation of gains from the sales of intangibles at 3%. The bill proposed by the Special Commission by imposing a general income tax would include gains from the sale of all forms of capital assets in taxable income, and thus gains from the sale of real estate and tangible personal property would for the first time be subject to taxation under the state laws.

No logical reason appears for confining the tax on capital gains to gains from the sale of intangibles, but many of those who have studied income taxation most closely question the propriety of including capital gains in taxable income at all. While capital gains may be treated as income for purposes of taxation so far as the constitution is concerned, they are not deemed income for purposes of accounting, or in the case of trusts when the income of the trust property is payable to a beneficiary for life or years, so that it would be no great stretch of the legislative conscience to exclude them altogether from income for purposes of taxation.

The chief objection to the inclusion of capital gains in taxable income is the fact that this item in the tax returns, state and federal, had caused more trouble, confusion and controversy than almost all of the other items combined, and no progress can be made toward

the much desired simplification of income tax procedure as long as capital gains are included in the tax. Furthermore, as the taxpayer can to some extent govern the time when he can make the gain or take the loss on the sale of capital assets, a provision recognizing gain or loss on the sale of capital assets, when part of a general income tax under which capital losses are deductible from ordinary income, necessarily permits some manipulation by the taxpayer to his own advantage, and the revenue from the income tax as a whole is accordingly not increased by treating capital gains as income and capital losses as deductible in a measure commensurate with the difficulties which this form of tax has caused both taxpayers and taxing authorities.

While, as already stated, there is no good ground for discriminating in a tax on capital gains between gains from the sale of intangibles and gains from the sale of other forms of property, other than a vague conception that buying and selling stocks is a form of gambling and is reprehensible and should be burdened with a tax, a change in the law which adds to the confusion and uncertainty of income taxation by increasing the class of capital assets, gain on the sale of which is taxable, is open to grave objections.

(4) *The change in the personal exemption.*

The adoption of a general income tax almost necessarily involves the establishment of an exemption applicable to the same degree to all forms of income, and the extent of the exemption which should thus be granted appears to have aroused more discussion than many more vital points in the proposed tax.

The establishment of a uniform exemption in a general state income tax creates a dilemma from which escape is difficult. With respect to the tax on earned income, a substantial exemption is required by established custom and sound principle. A man who is dependent on his personal efforts for his living ought not to be called on to contribute out of his earnings to the cost of government until he has made reasonable provision for the day-to-day support of himself and his family. When earned income was the subject of municipal taxation, an exemption of $2,000 was allowed, and this exemption was continued when the tax on earned income was taken over in 1916 by the state, and a further allowance of $500 in the case of a married man and an additional $500 for two or more children was granted.

It was thought that this exemption represented the amount necessary to provide for a reasonably comfortable living, and that

the excess over that amount might properly be subjected to a moderate tax. If however the exemption was appropriate for its purpose in 1916, the increase in the cost of living since that year has changed the situation and a substantially larger exemption even as high as $3,500 is not improper at the present time.

In the case of income from property the problem is entirely different. It has never been deemed necessary or proper to exempt a substantial amount of property in the hands of each taxpayer from direct taxation. Property of widows and orphans not exceeding one thousand dollars in capital value is exempt from the local property tax, provided the whole property of the taxpayer does not exceed one thousand dollars; household furniture not exceeding one thousand dollars in value is exempt in the case of every taxpayer, and the tools of a mechanic and the boats and fishing gear of a fisherman not exceeding three hundred dollars are also free from taxation.

When intangibles were subject to the local property tax there was no exemption except the very moderate one in the case of widows and orphans, and when it was decided to tax such property on income instead of on capital value there was no occasion for an increase in the exemption over that given in the case of other classes of property. In fact however an exemption was granted of $300 of income from taxable intangibles in the case of persons whose income from all sources did not exceed $600. This constituted in effect an exemption of $6,000 in capital value and was certainly more liberal than the exemption granted to persons of moderate means whose savings were invested in real estate. This exemption has since been increased to $1,000 in income, or in effect to $20,000 in principal, in the case of a person whose income from all sources does not exceed $1,000 during the year.

Under the proposed law, if the exemption is increased to $3,500 the result will be that a person may hold $70,000 in taxable bonds and notes and in stocks of foreign corporations without paying a cent in taxes under the laws of the Commonwealth either on principal or income. Whether or not such an exemption is suitable and proper, there can be no question that if a resident of this Commonwealth ought to be allowed to hold $70,000 in taxable stocks and bonds entirely tax free, he ought in like manner to be allowed to hold real estate to the value of $70,000 exempt from all taxation. No reason exists for any discrimination against the real estate; in fact thrifty people of limited means are more apt to invest their

savings in two-family houses and other forms of real estate than in the stocks and bonds which, until recent times at least, were more familiar to the wealthier classes.

An exemption of $70,000 worth of real estate to each person owning no other income producing property is not however to be seriously contemplated; neither would an exemption of $70,000 in capital value of bonds and stocks be proposed seriously if we had the equivalent of our tax on income, namely a three-mill tax on capital values, in force in this state. The fact that because of the necessity outlined above our tax on intangibles is measured by income instead of by capital values has given an entirely false idea to many people as to the exemption to which they are fairly entitled; but to grant an exemption from all taxation, to one class of property only, up to $70,000 in capital value seems to the writer to be going altogether too far.

The difficulty of providing in a general income tax a limit of exemption that will be reasonable to the man without property working for the support of his family with his brain or his hands, and will not at the same time offer a perfectly preposterous privilege to the holders of a very substantial accumulation of stocks and bonds illustrates one of the objections to a general income tax in this Commonwealth.

(5) *The adoption of a graded or progressive tax.*

The proposition of the Special Commission that we should adopt a graded or progressive income tax, with the larger incomes subject to a higher rate, has met at least a temporary set-back through the decision of the Supreme Judicial Court that such a tax is prohibited by the State Constitution. If however the proposition is sound, this difficulty can be overcome by an amendment to the Constitution.

A graded income tax was not authorized when the Income Tax amendment to the State Constitution was adopted, because it was contemplated that only a limited class of property would be taxed with respect to its income, and the great bulk of property would still be taxed on capital value, and a graded or progressive tax is not equitable under such circumstances, since the gradations would not be based on total wealth or income. Obviously, if gradations were applied to the present law, one taxpayer might have all of his property invested in securities subject to the income tax and pay a tax thereon at a higher rate than another whose total wealth and income were greater but who had invested the major part of his funds in

property taxed on its capital value at a fixed rate, such as real estate or the stock of domestic corporations, and whose holdings in securities taxed with respect to income were less than that of the taxpayer first mentioned. Unless a general income tax is to be adopted, the power of gradation would be of little benefit, except perhaps in the case of a tax on earned income, and even in such case it would operate unfairly against the taxpayer whose income was largely earned as compared with an investor who derived an equal or greater income from property.

Unless therefore the general income tax is to be adopted, an amendment to the Constitution authorizing a graded or progressive income tax is not necessary or desirable. A graded income tax under state authority is not however a radical or dangerous measure, because the fear of driving capital from the state restrains all but the most imprudent from advocating excessive rates in the higher brackets.

Conclusion.

We should not be misled by the success of the Federal Government in imposing a general, graded income tax, for with the Federal Government the problem is not complicated as it is in the case of the states by direct property taxes levied on certain classes of the property which is to be taxed with respect to its income and which are necessarily relied on to furnish the major part of the public revenue. Neither should we follow blindly the example of New York which successfully applies a general graded income tax with rates ranging from one to three per cent. The annual increase of taxable valuations in New York City alone of a billion dollars a year simplifies the fiscal problems of the state and removes the necessity of securing from intangible property as heavy a contribution to the public treasury as it can reasonably bear.

If our present income tax is unsound—and the fact that the return from that tax has increased with reasonable steadiness from year to year indicates that at least it is not driving capital out of the state—we should rather follow the example of other progressive states whose fiscal problems are more similar to ours, and consider the adoption of a constitutional amendment authorizing the levy of a classified property tax.

Under such a tax intangibles could be taxed at a low fixed rate on capital value, and those classes of tangible personal property which experience has shown cannot bear the full local rate, such

as household furniture, machinery used in manufacture and merchandise, could also be taxed at fixed rates appropriate to the class; or, as an alternative, the different classes of property could be taxed at the local rate but at specified percentages of their true value, and the owners of such property would then retain their interest in the tax-rate and in economical municipal government.

Both of these plans have been tried, and while it is too early to announce final results, it would seem that there is at least no loss in revenue from the reduction in the rates on certain classes of tangible personal property and no greater burden imposed on real estate, while the tax on the classes of tangible personal property to which reasonable rates are applied is enforced more evenly, completely and equitably and with less danger of driving business and manufacture out of the state.

If, under such a constitutional amendment as has been suggested, allowing classified property taxes, we substituted a three-mill tax on intangibles for the present 6% income tax, the return might be substantially the same, but at least we would not hear the complaint, so commonly made now, that the holders of taxable intangibles ought to have the benefit of the $2,000 exemption applied to earned income; for few would have the hardihood to insist that they were entitled to hold bonds of the value of $40,000 free from any tax whatever, nor would we hear, as we have recently heard, the friends of the working classes unwittingly advocating a law which would allow a man to live in idleness on the income of $70,000 in taxable bonds without paying a penny of taxes to either city or state.

PHILIP NICHOLS.

THE SUPERIOR COURT AND THE NECK OF THE BOTTLE AGAIN—1929 MODEL.

The MASSACHUSETTS LAW QUARTERLY for February, 1929, contained an article in which the attempt was made to tabulate and analyze certain statistics of the Superior Court for the year ending June 30, 1928, accompanying the Fourth Report of the Judicial Council, relating to the state of the docket, the number of verdicts and findings, and their amounts.

As the statistics of the Court for the year ending June 30, 1929, are now available, the time seems ripe for a like tabulation and analysis of the latest figures, and for a comparison with those of the preceding year.

If, as seems to me arguable, conditions in the Superior Court have an intimate relation to the agitation over the Compulsory Motor Insurance Law, it is an opportune moment, now that the special commission on that subject is sitting, to consider, in the light of statistics, the situation of the Court with particular attention to motor tort litigation.

I.

TABLES AND TABLE-TALK.

It should be understood that the figures given in the following tables are not absolutely accurate. They are, however, the best available, and, inasmuch as we are looking only at the general trend and not striving for mathematical accuracy, the margin of error, if any, is not sufficient to impair their value for our purposes.

The statistics run to June 30, of each year. For the sake of brevity, they will generally be referred to as figures for the year 1929, or whatever year is stated; it being understood however, that the year ends June 30, and not December 31.

TABLE I

Civil Cases Superior Court

Entries

	New Cases Entered		
Year Ending	Jury	Jury Waived	Equity
June 30, 1910	8,167	2,701	1,599
June 30, 1920	11,790	3,848	2,208
June 30, 1924	16,899	5,065	3,230
June 30, 1925	18,117	4,973	3,009
June 30, 1926	18,282	4,941	3,316
June 30, 1927	19,403	5,110	3,655
June 30, 1928	27,377	5,256	3,392
June 30, 1929	27,592	5,743	3,502

Table I shows the steadily increasing number of new cases entered yearly. Observe that while the number of jury waived and equity cases each increased about 100% between 1910 and 1929, the number of jury entries went up 239% in that period.

Compulsory motor car insurance began January 1, 1927. Its effect, as shown in the marked increase of jury entries for 1928 and 1929, seems to have been immediate. In 1928, the first full court year after compulsory insurance, the jury cases entered amounted to nine thousand more than in 1926, the last full court year prior to compulsory insurance, an increase of 50%.

The pace was held in 1929, in which year the increase was also 50% over the cases entered in 1926.

TABLE II

Law Entries in Suffolk

Year	No. Law Entries
1913	6,278
1921	9,090
1929	16,562

Between 1913 and 1921 the law entries in Suffolk increased 62%, and between 1921 and 1929, 82%, an increase for the eighteen years of 163%.

Though there are no official statistics prior to 1905, we can get an idea of the situation in 1902 by glancing at Table III. This document, compiled by the late J. J. Feely, was found among the papers of the late Mr. Justice Braley.

TABLE III

CIVIL CASES PENDING IN SUPERIOR COURT IN 1902

Counties	Civil Cases Pending	No. Cases Awaiting Trial	Yearly Increase For Five Years	Cases Entered For the Last Year
Suffolk	13,975	6,000	10%	6,922
Middlesex	4,000	3,000	5%	2,100
Essex	2,000	2,000	3% 12% for 1901	1,279
Worcester	1,784	1,500	.....	956
Norfolk	950	350	9%	654
Bristol	1,187	600	9% 1901	773
Hampden	1,175	1,055	4%	805
Plymouth	536	536	10%	442
Berkshire	400	400	10%	310
Hampshire	259	259	slight	177
Barnstable	160	160	10%	85
Dukes	41	20	.....	24
Nantucket	25	25	4%	35
Franklin	.....	....	10%	166
Totals	26,492	15,405 (15,905)	Av. 9%	14,644 (14,728)

The number of law cases reported as awaiting trial on June 30, 1929, was 67,393, but this figure includes 25,556 inactive cases subject to dismissal under Rule 62.* Deducting all the inactive cases, though a certain number, estimated at 15%, will probably be restored to the active list, there remain 41,800 law cases awaiting trial. In 1902 the number of cases awaiting trial was, as appears in Table III, 15,905. The increase in twenty-seven years of law cases awaiting trial is 25,900 cases, 162%; or, to put it in another way,

* Common law, Rule 62, as amended April 26, 1926, to take effect August 2, 1926, provides that in each June in Suffolk and in each September in the other counties, all actions, law, equity and divorce, which have remained quiescent for two years, shall be marked inactive by the clerk, and notice thereof sent to counsel; that if, within three years after a case has been marked inactive, it has not been tried or disposed of, it shall be dismissed and judgment or decree of dismissal entered on the day next following the expiration of said three years, without further notice or order.

Owing to the amendment of the rule no cases were dismissed in 1926, 1927 and 1928. These cases have accumulated as shown in Table IV.

The cases in outside counties marked inactive in September, 1926, were dismissed in September, 1929.

The first Suffolk cases marked inactive under Rule 62 as amended, will be dismissed in June, 1930.

The first batch of cases dismissed under Rule 62 as amended, will appear in the Court's statistics for the year ending June 30, 1930, comprising the cases in Table IV marked inactive on June 30, 1927.

there were only 38% as many law cases awaiting trial in 1902 as in 1929.

In 1902 there were eighteen justices, in 1929, thirty-two. While the number of jury entries alone has increased in this period 239%, and the number of law cases awaiting trial 162%, the number of judges has grown only 77%.

Apparently it is expected that the fourteen additional judges, created since 1902, can take care of the 200% increase in jury entries and of the 100% increase in jury waived and equity cases.

The extraordinarily large number of cases settled, for only about 2,500 are tried annually, and the number which become inactive are shown in Table IV.

TABLE IV

No. Disposed of or Marked Inactive

Year Ending	No. disposed of by agreement of parties or order of the Court			Marked inactive at any time and subject to dismissal		
	Jury	Jury Waived	Equity	Jury	Jury Waived	Equity
June 30, 1924.....	15,813	5,413	1,510			
June 30, 1925.....	14,606	4,410	3,158			
June 30, 1926.....	15,632	4,018	6,140			
June 30, 1927.....	15,043	3,282	2,275	9,664	3,439	2,142
June 30, 1928.....	18,050	3,802	1,959	14,804	3,658	1,306
June 30, 1929.....	19,036	3,732	1,933	19,268	6,293	5,364

II.

Verdicts, Findings, and Amounts Thereof.

In our study of the state of the docket, it is of importance to ascertain what the moving litigant is likely to obtain as a result of his law-suit. This information is given in Tables V and VI. These Tables include every verdict and finding throughout the entire Commonwealth, as listed by the clerks of the Court.

TABLE V

VERDICTS AND FINDINGS FOR YEAR ENDING JUNE 30, 1929

TORTS

County	Jury				Jury Waived			
	Motor Torts		Other Torts		Motor Torts		Other Torts	
	Pltf.	Deft.	Pltf.	Deft.	Pltf.	Deft.	Pltf.	Deft.
Barnstable	0	1	4	0				
Berkshire	17	11	2	2	1	0	1	0
Bristol	14	32	4	9	6	0	1	0
Dukes								
Essex	43	66	29	22	7	4	5	4
Franklin	9	9	1	0	1	0		
Hampden	65	34	6	17	2	1	3	1
Hampshire	7	7	3	3				
Middlesex	107	131	40	49	11	5	4	7
Nantucket								
Norfolk	42	26	3	5	8	3		
Plymouth	19	7	5	5	1	0	0	1
Suffolk	(1)		289	291			61	17
Worcester	89	36	14	18	9	3	0	2
Total	412	360	400	421	46	16	75	32

Grand Total....1,762

(1) Motor Torts in Suffolk are not segregated but are included in "Other Torts."

CONTRACTS

County	Jury		Jury Waived	
	Plaintiff	Defendant	Plaintiff	Defendant
Barnstable				
Berkshire	3	1	3	0
Bristol	12	0	3	3
Dukes	1	0		
Essex	29	12	5	0
Franklin	2	2	4	0
Hampden	9	11	5	2
Hampshire	4	6		
Middlesex	49	20	8	8
Nantucket				
Norfolk	9	2	7	1
Plymouth	9	6	2	0
Suffolk	192	114	25	23
Worcester	27	8	14	8
Total	346	182	76	45
Grand Total	649			

Grand Total for Torts and Contracts.....2,411

TABLE VI

SUMMARY AND ANALYSIS OF VERDICTS AND FINDINGS FOR THE YEARS 1928 AND 1929

TORTS (SUFFOLK NOT INCLUDED) EXCEPT IN OTHER TORTS

JURY

	Motor Torts				Other Torts			
	Verdicts for Pltf.	Verdicts for Deft.	Total Verdicts	Percentage of Verdicts for Pltf.	Verdicts for Pltf.	Verdicts for Deft.	Total Verdicts	Percentage of Verdicts for Pltf.
1928....	268	257	525	51	616	616	1,232	50
1929....	412	360	772	53	400	421	821	48

JURY WAIVED

1928....	131	19	150	87	68	25	93	73
1929....	46	16	62	74	75	32	107	70

CONTRACTS

	JURY				JURY WAIVED			
1928....	444	215	659	67	98	38	136	72
1929....	346	182	528	65	76	45	121	63

Table VII is a summary of Table VI, and includes the corresponding figures for 1928.

TABLE VII

SUMMARY OF TABLE VI

	Total Verdicts for Pltfs.	Total Verdicts for Defts.	Percentage of Verdicts for Pltfs.	Total Findings for Pltfs.	Total Findings for Defts.	Percentage of Findings for Pltfs.
1928.....	1,328	1,088	55	297	82	78
1929.....	1,158	963	54	197	93	68

	Total Verdicts and Findings for Plaintiffs	Total Verdicts and Findings for Defendants	Total Verdicts and Findings	Percentage of Verdicts and Findings for Plaintiffs	Percentage of Verdicts and Findings for Defendants
1928.....	1,625	1,170	2,795	58	42
1929.....	1,355	1,056	2,411	56	44

The percentages of verdicts and findings for plaintiffs in 1929 show no noteworthy disparity from 1928, and rather tends to strengthen the conclusion that juries are not particularly favorable to plaintiffs in tort cases, as the figures for both years show almost an even break between the parties in tort litigation.

Having learned that the probable result of trial is about an even chance either way, we may do well to ascertain how much the fortunate plaintiff is likely to recover.

The amounts of all the verdicts and findings for the years 1928 and 1929 are given in Table VIII.

TABLE VIII

VERDICTS OR FINDINGS FOR PLAINTIFFS

Amount of Verdict or Finding

	$1 to $500	$501 to $1,000	$1,001 to $2,500	$2,501 to $5,000	$5,001 to $7,500	$7,501 to $10,000	$10,000 to $20,000	Over $20,000	Totals
TORTS									
Jury:									
1928 Motor Torts	137	47	40	26	8	7	3	0	268
1929 " "	176	73	74	51	20	3	14	1	412
1928 Other Torts.	274	94	132	65	24	17	10	4	620
1929 " "	180	65	55	66	15	9	9	1	400
Jury Waived:									
1928 Motor Torts	53	28	26	12	5	2	3	0	129
1929 " "	20	13	8	5					46
1928 Other Torts.	49	11	4	1	1	1	1	0	68
1929 " "	43	12	9	7	2	1	1	0	75
CONTRACTS									
1928 Jury.....	210	99	87	26	8	5	6	2	443
1929 "	149	78	75	29	6	4	4	1	346
1928 Jury Waived	59	16	14	7	3	0	0	0	99
1929 " "	28	14	21	10				3	76
1928 Totals.....	790	298	304	138	49	32	24	6	1,627
1929 "	596	255	242	168	43	17	28	6	1,355

The percentages of the 1,627 verdicts and findings in 1928 and the 1,355 in 1929 under $500, under $1,000 and over $1,000 are shown in Table IX.

TABLE IX

PERCENTAGES OF VERDICTS OR FINDINGS UNDER $500, AND UNDER AND OVER $1,000

	$500 or Under	$1,000 or Under	Over $1,000
TORTS			
Jury:	*Per Cent.*	*Per Cent.*	*Per Cent.*
1928 Motor Torts	51	69	31
1929 " "	42	60	40
1928 Other Torts	44	59	41
1929 " "	45	60	40
Jury Waived:			
1928 Motor Torts	41	62	38
1929 " "	43	71	29
1928 Other Torts	72	88	12
1929 " "	57	73	27
CONTRACTS			
1928 Jury	47	70	30
1929 "	43	66	34
1928 Jury Waived	60	76	24
1929 " "	37	55	45

Of the 1,355 verdicts and findings for plaintiffs 851, 63%, are for amounts not in excess of $1,000; 410, 30%, run from $1,000 to $5,000; while only 94, 7%, are for sums in excess of $5,000.

The percentages of verdicts and findings up to $500, up to $1,000, and in excess of $1,000 do not vary significantly from those of the previous year. It begins to look as though it could be predicted with a fair degree of accuracy that about two-thirds of the recoveries in tort cases will not exceed $1,000.

One does not get the impression that litigation, especially that of the motor variety, is a particularly lucrative source of revenue to the judgment creditor. Possibly the joy of battle is worth the cost to all concerned, including the Commonwealth which furnishes upon the payment of only three dollars per fight, a clerk and assistants, a clerk's office and a motion session to enable the contestants

to warm up, a battlefield, in the shape of a court-room, one umpire, denominated a judge, one clerk, a stenographer, twelve jurymen, one or more bailiffs, heat, light, and paper for the lawyers.

III.

The Capacity of the Neck of the Bottle.

The inflow of cases has importance only in its relation to the outflow. We come now to consider with particularity what the outflow amounts to.

This can be measured in two ways, and the measurements compared with each other. The two methods are, one, determination of the time elapsing between date of writ and trial, and, second, the number of cases tried annually.

The time lapsing between date of writ and time of trial for the years 1902, 1925, and 1929 is set forth in Table X.

TABLE X

TIME BETWEEN DATE OF WRIT AND TRIAL

JURY CASES

County	Year	Average time between date of writ and trial
Barnstable	1902 (1)	6 mos.
	1925 (2)	1 yr. 1 mo.
	1929 (3)	2 yrs. 6 mos.
Berkshire	1902	1 yr.
	1925	2 yrs. 9 mos.
	1929	1 yr. 2 mos.
Bristol	1902	6 mos.
Taunton	1925	3 yrs. 3 mos.
	1929	1 yr. 10 mos.
New Bedford	1925	3 yrs. 9 mos.
	1929	2 yrs. 7 mos.
Fall River	1925	3 yrs. 5 mos.
	1929	1 yr. 4 mos.
Essex	1902	6 mos.
Salem	1925	3 yrs. 7 mos.
	1929	2 yrs. 1 mo.
Lawrence	1925	3 yrs. 2 mos.
	1929	1 yr. 3⅔ mos.
Newburyport	1925	2 yrs. 9 mos.
	1929	3 yrs. 5 mos.

TABLE X

Time Between Date of Writ and Trial

JURY CASES (Continued)

County	Year	Average time between date of writ and trial
Franklin	1902	
	1925	6 mos.
	1929	8 mos.
Hampden	1902	8 mos.
	1925	2 yrs. 5 mos.
	1929	1 yr. 7 mos.
Hampshire	1902	9 mos.
	1925	10 mos.
	1929	2 yrs. 3 mos.
Middlesex	1902	15 mos. 2 yrs.
Cambridge	1925	2 yrs.
	1929	2 yrs. 1 mo.
Lowell	1925	1 yr. 4 mos.
	1929	1 yr. 3 mos.
Norfolk	1902	1 yr.
	1925	1 yr. 1 mo.
	1929	2 yrs.
Plymouth	1902	3 mos.
	1925	2 yrs. 1 mo.
Plymouth	1929	1 yr. 8 mos.
Brockton	1929	2 yrs.
Suffolk	1902	1 yr. 6 mos.
	1925	2 yrs. 5 mos.
	1929	2 yrs. 3½ mos.
Worcester	1902	6 mos.
Worcester	1925	2 yrs. 8 mos.
	1929	1 yr. 9½ mos.
Fitchburg	1925	1 yr. 8 mos.
	1929	1 yr. 9 mos.

(1) Compiled by the late J. J. Feely, in 1902.
(2) 1st Report Judicial Council, p. 122.
(3) Furnished by Chief Justice Hall.

It appears from Table X that in every county, eliminating Dukes and Nantucket, for which the figures do not seem to be reported in either 1925 or 1929, the time between date of writ and trial was less in 1902 than in either 1925 or 1929.

In 1902, when the Court had eighteen justices, there were 14,644 civil cases entered. In 1929, with a court of thirty-two, there were 33,159 law cases alone entered, also 3,502 equity and 365 divorce cases, a total of 37,026. While the bench has increased 77% since 1902, the number of civil cases entered in 1929 has grown 152%. Small wonder that the docket has fallen behind!

What about the future? Table X shows the status on July 1, 1929. It cannot be taken as guide to the status on July 1, 1930, and succeeding years, because of the sharp increase in the number of jury cases entered in the two succeeding years.

Suffolk furnishing approximately one-half the law cases entered in 1928 and 1929, as it did in 1902, is the controlling factor. Let us glance at conditions in Suffolk. The jury entries for 1927 in that county were 9,700. For simplicity all figures will be given in round numbers to the nearest hundred. In each of the two succeeding years, the jury entries were 12,500—an increase of 29 per cent. Since, on July 1, 1929, the most recent date of writ of a jury case on the general list actually tried was June 18, 1927, the effect of the 29% increase of entries in 1928 and 1929 had not then been felt. How great the effect will be cannot be foretold with certainty, but there is sufficient data to allow an estimate. Assuming that the ratio of cases disposed of, either by agreement of the parties or by order of court, to the total number of cases entered, and the number of sittings remain about the same as in the past,—then the 29% increase of cases in 1928, over 1927, will postpone the time of trial of cases entered in 1929 by 29 per cent. On July 1, 1929, none of the 1928 cases having then been reached, the average time between date of writ and trial was 27½ months in Suffolk. A 29% increase in the entries for 1928 suggests that it will take 29% longer to clear the docket of 1928 cases, so that, before the 1929 cases come on to be tried, the time elapsing between date of writ and time of trial of the 1928 cases will be not 27½ months, but that period plus 29%, 8 months, totaling 35½ months. The lag between date of writ and time of trial will creep up gradually, from month to month. Its full effect will not manifest itself for a couple of years.

As to the 1929 cases, which also showed an increase of 29% over the 1927 entries, the same process will be repeated, so that by

the time the 1930 cases are taken up, the Court seems likely to be another eight months behind.

The same line of reasoning applies to the state generally, for in all counties there has been a substantial increase of entries in the past two years, the result of course, of the Compulsory Insurance Act. Even Nantucket, which had only one jury entry in 1927, showed eleven in each of the two following years. In fact, the increase of jury entries in 1928 and 1929 in all the counties seems to be 41% over 1927, considerably larger than in Suffolk. It seems to follow that the time between date of writ and trial will extend more rapidly in the other counties, than in Suffolk.

The estimate as to the widening margin between date of writ and trial in Suffolk is not to be considered a hard-and-fast prediction. Its chief purpose is to illustrate what is indeed a patent fact, that other things remaining the same, an increase of 41% in cases entered throughout the State must inevitably, very materially, add to the congestion of the docket.

Number of Cases Tried.

Attention has been called to the number of law cases pending and to the vast increase in the number entered during the last two years. The significance of the annual inflow of cases, it is worth repeating, depends entirely upon the annual outflow. If the outlet can take care of the inflow, there is no problem. The neck of the bottle is, therefore, the number of cases tried annually by the court. What is that number? In my former article on this subject, figures were given, purporting to show the number of cases tried each year for the past five years. These figures were taken from the Secretary of State's report which is compiled by him from statistics sent to him by the various clerks of court. It appears therefrom that for the year ending June 30, 1927, 2,672 jury cases and 669 jury waived cases were tried. It has recently been learned that in some instances the figures sent to the Secretary of State, for which he is not responsible, include not merely the cases actually tried but all cases appearing upon the trial list, whether tried, settled, continued, or otherwise disposed of. Therefore, the figures in the annual report of the Secretary of State are not entirely accurate. We can better ascertain the number tried in another way. We have the exact number of verdicts and findings for both plaintiffs and defendants in the last two years. These figures show the following results:

TABLE XI

NUMBER CASES TRIED DURING YEAR

Year	Jury	Jury Waived
1928	2,416	379
1929	2,121	290

These figures do not take into account all the cases actually brought on for trial. There are always a number of disagreements in jury cases, amounting in 1929 to 73, and some cases are undoubtedly settled during the trial. It appears then that the jury cases actually tried in 1928 and 1929 amount to less than 10% of the new cases entered in each of those years. The number of jury waived cases tried is a little over 5% of the entries. If the Superior Court is to keep abreast of its annual docket, about 90% of the cases entered must be disposed of in some other way than by trial. This situation justifies the query whether trial by jury does now obtain in Massachusetts. If we should wipe out the entire docket, as of last June, and start afresh with no cases pending, and if, out of the cases entered for the year beginning July 1, 1929, nine out of every ten cases entered should be settled or otherwise dismissed, then the Superior Court would just about clear the docket every year. We like to imagine that every man can, if he wishes, have his case tried to a jury, but the facts are otherwise. The neck of the bottle is so small that there trickles through only an insignificant stream in comparison with the regularly augmenting reservoir of cases pressing for trial.

To avoid a possible misunderstanding, it should be stated that there is no thought of placing upon the shoulders of an overburdened court any imputation for the delay in getting to trial. If the thirty-two justices did nothing but try civil jury cases, they could hardly dispose of more than five thousand cases a year.

In 1929 the Court devoted no less than seventeen hundred and fifty-three days to criminal business and tried twenty-four hundred and eighty-two criminal cases. Even at that there were twenty-four hundred and ninety-seven criminal cases awaiting trial on June 30, 1929.

In addition there are the motion session, the equity work, and the innumerable unconsidered trifles, including motions for new trials and settling bills of exceptions, all demanding much time and attention.

Conclusions.

On the one hand it appears inevitable that the time between the entry of a case and its trial must inevitably lengthen materially each year, with the very strong probability that the day is not far distant when five years will not see a new-born case mature into trial.

On the other hand, it is apparent that the Court cannot, as organized today, try more than 2,500 jury cases a year. The figures showing number of cases tried as published by the Secretary of State for the five years beginning with June 30, 1924, though probably over-generous, average only 2,700 jury cases and 600 jury waived cases a year.

The significance of the trial output in relation to the inflow should continuously be kept in mind throughout this discussion.

IV.

Various Schemes for Compensation With Comments As To Their Effect Upon the Courts.

Under this heading the several plans proposed for compensation for motor injuries will be considered solely in relation to their effect upon the dockets of the courts. It will be understood that the discussion is merely of probabilities and not dogmatic assertions.

1. Voluntary Insurance Only.

Let us assume that the present Compulsory Act is replaced, and nothing substituted, so that we resort to the status prior to 1927—when automobile owners were free to insure or not as they chose.

How will this affect the Court?

There will still remain the grist of over two years' cases brought under the present law. How many years must elapse before these accumulations are cleared away it would be rash to predict. One may pretty safely guess that three years will not see the end of them.

It seems from our figures, that the Compulsory Insurance Law brought an immediate inflow of eight to nine thousand cases, which would not otherwise have been brought. Reversion to the status prior to 1927 might reduce the new cases entered to about 18,000 a year, the number entered in 1926. In view of the increasing number of motors, it is not likely to be less than 18,000 and probably

would be more. At any rate when only 18,000 cases were being entered, the Court was falling behind. Therefore, merely returning to voluntary insurance will not enable litigants to come very close to prompt trial.

2. Compulsory Insurance As At Present.

Under this heading we are on fairly firm ground for discussion, since we have the figures. The entries for each of the last two years have increased about 9,000 over 1926, the last full year of voluntary insurance. As the entries for 1929 were no larger than for 1928, the tentative conclusion is that there will be no sudden increase hereafter.* That the number of entries will grow year by year, as long as the number of automobiles grows, seems inevitable. If the present Act is kept in force, plans should be devised whereby 28,000 cases a year can be promptly dealt with. This does not mean that the Court will try 28,000 cases a year, for under no circumstances is it likely that even one-half of the entries will ever come to trial.

3. State Fund.

Here we enter into the realm of pure speculation. Is the director of the fund to have power to settle claims? If so, will he have an arbitration board, or will his subordinates be given authority to settle as they think wise? Passing entirely as irrelevant to this discussion, the desirability of having a state fund, one cannot be blind to the great amount of machinery which will have to be set up to administer it.

There are only three possible modes of procedure.

1. All questions of liability and amount of compensation shall be decided by the director of the state fund, or his employees, or, what is in effect the same thing, by some sort of a commission. In this event, the Superior Court ceases to function in motor tort cases.
2. The officers of the state fund may settle claims, leaving dissatisfied claimants to sue in the court. Under this state of affairs, unless the settlements are unexpectedly liberal—a matter for which the Insurance Companies are today being criticized whether rightly or wrongly,—it is difficult to see how the number of cases entered annually in the court

* Subsequent to the writing of this article, the Clerk of the Suffolk Superior Court announced that the October list of entries of new civil cases totaled 1,430, an increase of 514 over the entries for October, 1928.

will decrease. Matters will remain much as they now are, with the Court falling further and further behind. This scheme affords no relief, either to claimants or to the Court.

3. Payments out of the state fund shall be made only after a verdict of finding by the Court.

No need to prolong the agony by pointing out what this plan would do to the docket.

4. The New Hampshire Plan.

The gist of this plan is that upon the bringing of an action to recover damages for death, or injury to person or property, resulting from a motor vehicle accident, the Court shall make a preliminary inquiry into the following questions:

1. Whether the accident was due, in whole or in part, to the negligence of the defendant and not due, in whole or in part, to the negligence of the plaintiff.
2. Whether the motor vehicle was operated by its owner.
3. Whether, if not operated by the owner, it was being operated with the expressed or implied consent of the owner.

If upon such inquiry as to the Court seems proper, the Court shall find that such accident was probably due, in whole or in part, to the negligence of the defendant, and not due, in whole or in part, to the negligence of the plaintiff or the plaintiff's intestate, the Court shall order the defendant to furnish forthwith such security as to the Court shall seem proper to satisfy a final judgment, up to $5,000 in the case of bodily injury or death, and up to $1,000 for damage to property.

Without entering into the merits of this plan, but considering it solely in relation to its effect upon the Court, the following observations occur: It is fallacious to conclude that, because this plan may prove satisfactory in New Hampshire, it will work equally well in this Commonwealth. New Hampshire is properly classified as a rural state. It has no large cities. Its courts may not be as loaded with cases as our own courts; they may be in much better condition to take care of extra litigation; furthermore, there may not be, in this rural state, the number of accidents in proportion to the number of automobiles that there are here. There are today 107,000 automobiles registered in New Hampshire; over 800,000 in Massachusetts. Before pronouncing the New Hampshire law a success, it would be necessary to make a pretty complete survey of the condition of its courts. Attention is merely drawn to the danger of arguing that whatever success the New Hampshire act may

have had in that state, equal success would attend it here. Conditions in the two states are too different to make the analogy safe.

Let us now consider the juridical features of the New Hampshire act with specific reference to conditions in Massachusetts. The New Hampshire act calls for a preliminary hearing. A hearing is not required when the defendant can show the court that he is insured. How many motor owners would carry insurance, if not compelled, is purely conjecture. The Judicial Council referring to the report of the Attorney General and the Insurance Commissioner relative to accidents caused by the operation of motor vehicles states that the report shows that the number of motor vehicles covered by insurance in 1919 was estimated as low as 30% and as high as 70%. It is hard to guess how many owners would take out insurance, if the New Hampshire act were in effect here. If something like 18,000 of the 28,000 cases entered last year are for motor torts, one would seem reasonably safe in surmising that at least 30% of the defendants would not voluntarily have taken out insurance. This would mean that there would have to be somewhere in the neighborhood of 5,000 preliminary hearings a year. I am not overlooking the fact that under the New Hampshire act more people would probably take out insurance than would be the case if we reverted to the status prior to 1927. Some provision must be made for those cases which we know would not insure, and in considering how the cases of the uninsured are going to affect the court it would not be prudent to assume that more than two-thirds of the accident cases will be covered by insurance. We should err rather on the side of the maximum of cases requiring a preliminary hearing than on the minimum, though it is to be feared that the assumption that two-thirds of the motor owners would take out insurance if the New Hampshire plan were in force here is verging on optimism.

Let us assume that 5,000 cases a year are brought to our courts for preliminary hearing. How can the Superior Court, loaded as it now is, possibly take on this new burden? How much time are the preliminary hearings to take? How many witnesses are going to be heard? How can a court come to a conclusion, fair to both parties, unless it goes into the matter thoroughly? Probably nine-tenths of the cases brought up for preliminary hearing will involve judgment-proof defendants. If the Court refuses to order security in such cases, it may be presumed that the action will be dropped. Few plaintiffs take much satisfaction in getting a judgment which they know in advance will never be satisfied. On the other hand,

the Court will know, in many of the cases, that an order to the defendant to put up security will result only in depriving the defendant of owning an automobile, perhaps for the rest of his life. Under these circumstances involving such grave consequences to the parties, the Court is not going to give a snap judgment. The Court will, it seems, in many cases inevitably have to grant a full hearing, the only difference between the preliminary hearing and the real trial being that at the former the question of amount of damages will not come up. If the argument is sound, then the effect of the New Hampshire act will be to require two trials of one case. If the Superior Court is required to give 5,000 preliminary hearings a year on motor cases, the Court will be nearly incapacitated from doing any other business.

It may be suggested that the preliminary hearings be had in the District and Municipal Courts. Do we know as a fact that these Courts can, without utter disarrangement, take on 5,000 or even 2,000 such hearings, a year? As half the Superior Court docket comes from Suffolk alone, it is reasonable to assume that one-half of the preliminary hearings will come before the Municipal Court of Boston. One wonders how that Court, with its present number of judges, can digest anywhere from 1,000 cases up upon preliminary hearings.

It should be, and probably is by this time, obvious to all, that the question of how claimants can realize—entirely over-looked by the Legislature, when it passed the present Act—is as vital as the question of providing any security at all. What is the use of compelling security when no thought is taken as to how that security can be reached?

V.

A Word About the Dilemma of Insurance Companies.

Since the crisis in docket congestion is due to motor tort litigation almost if not entirely, the solution of the problem lies in devising some means of handling that particular class of cases.

In view of the recent agitation about insurance rates, and the charges that insurance companies are settling fraudulent claims, a word or two on that aspect may be not inappropriate.

The remarks that follow are not based upon any knowledge of the insurance business, are not made with any bias for or against the companies, and are not criticisms of their practices.

While there were 19,000 jury cases disposed of in 1928, only

2,121 of these dispositions was the result of trial; 17,000 were got rid of in some other manner. Many were settled, and of those settled not a few must have been motor cases. We also know that the companies settle cases without any action brought.

That practice is not criticized here. It may be taken for granted that the responsible officers of the companies know best how to conduct their affairs.

In view of the fact that only about half the plaintiffs in tort cases recover at all, that of the 884 tort verdicts for plaintiffs in 1928, 552, 62%, were for $1,000 or less, and of the 812 verdicts in 1929, 494, 60%, were for $1,000 or less; that approximately 45% of the verdicts in both years were for $500 or less, the question arises why the insurance companies seem to prefer settling to trial.

It may be that the cases tried are chiefly the ones in which the companies think that they have a particularly strong defence, that the ones about which they are doubtful are settled. It may be that experience teaches that it is cheaper, by and large, to pay one or two hundred dollars on a doubtful claim than to prepare for trial and pay trial counsel. While a company is hardly to be criticized for disposing of a claim with the least expense to it, the fact, if it be a fact, that it finds it cheaper to pay a doubtful claim rather than to submit to trial is an interesting commentary upon our dilatory, cumbrous, and unsatisfactory methods of trial. It may be that the insured defendant insists that the company settle instead of causing him to waste his time in court, for obviously the defendant has nothing at stake. His insurance company foots the bill.

Again, the insurance companies must know that if they adopted a general practice of refusing to settle, thus compelling a majority of the claimants to bring a court action and go through a trial, the docket of the Court would quickly and effectually be tied up in double bow knots. It would take years to try even one-half of the cases entered in 1928. The clamor arising if the companies should thus postpone payment of damages pending trial would, naturally though illogically, be directed principally against the insurance companies, and the impetus toward a state fund would be irresistable.

Few claimants would realize that it was not the fault of the insurance companies, but solely the failure of the Commonwealth to provide adequate facilities for that trial to which all are entitled under our laws, that their claims remained undetermined for months and years.

The insurance companies are apparently impaled upon the horns of a dilemma. If they should insist upon trial in a great number of cases, they would cause such delay as to open themselves to the charge that they were deliberately stalling; if they settle cases out of court, they are subject to attack on the ground that payments are made to fraudulent claimants.

It is possible that the primary, though probably unconscious, source of the agitation against the present Compulsory Insurance Act is that the legislature, while seeming to provide indemnity, failed to provide any speedy remedy for collecting, and unthinkingly dumped the whole matter onto a Court already laboring under the weight of its docket.

It is folly to talk of indemnity, whether by insurance or by a state fund, unless some method of speedy hearing on the merits of the claims is provided. The ability to collect promptly is not less important than the abstract right to indemnity.

VI.

Concerning Trial of Motor Cases By a Commission.

Upon even a casual examination of the foregoing tables, the conclusion can hardly be avoided both that the Superior Court, as now organized, cannot possibly cope with the great amount of litigation brought to it, and that the inevitable delay before a case can come to trial inflicts the greatest injustice upon the impecunious litigant, the one, above all others, who can least afford it.

It is peculiarly inconsistent for the Commonwealth to require motor insurance, and at the same time to fail to provide any tribunal in which the injured party can, within a reasonable time and at reasonable expense, avail himself of the benefit of that insurance.

The general unrest about the motor vehicle situation foretells the breaking of the dam.

If those who are most closely connected with the courts—the judges and the trial bar—can devise no remedy, it requires no fortitude to prophesy that the general public will—and that the probable course will be to remove from the courts all motor litigation.

As to this, it makes no difference whether the present compulsory insurance law is continued. A state insurance fund will equally require some method of trial. Even under the situation existing prior to the present insurance law, the Court was falling

steadily behind, as appears from a comparison of the figures in Table X showing the time elapsing between the date of the writ and trial in 1902, and in 1929.

The proposal to refer all motor cases to a commission has strong support. This means, in reality, the setting up of a new court whose members shall have all and more of the powers of judge and jury.

The supposed analogy between the workmen's compensation commission and the motor vehicle commission is both faulty and dangerous.

The former deals with a specific class, injured employees, is not concerned with acts of negligence except where the employee is injured by reason of his serious and willful misconduct, and awards damages in amounts prescribed by law.

A motor tort commission will have to do with all sorts and conditions of people, must premise its finding upon, and therefore inquire into, negligence, unless, as in workmen's compensation, the legislature shall enact a statute giving an injured party redress regardless of negligence, and will have to fix damages in such amounts as in its discretion seems proper.

The commission will truly and necessarily be a court—and a court with such powers as this Commonwealth has never bestowed upon its regularly constituted courts. It will take to itself probably over 50% of the combined jury and jury waived cases now coming to the Superior Court. There will be set up alongside of the Superior Court, whose justices are appointed practically for life and who are vastly experienced in trial work, a new tribunal whose members will have limited appointments, who will, doubtless in many instances, not be lawyers, who will not be experienced in estimating witnesses, analyzing testimony, and deciding cases, who will have to work out the technique of hearings, who will step all unprepared by previous experience into a welter of litigation.

How many cases would come to the Commission annually it is hazardous to guess. The only useable statistics now available are those given in the Fourth Report of the Judicial Council, page 7, showing that of the total law entries in the Superior Court from October, 1927, to February, 1928, 52.3% were motor vehicle cases. The Compulsory Insurance Act became operative January 1, 1927. It seems probable that its effect had not been fully felt as early as October, 1927. At any rate, we can be pretty sure that not less than 52% of the jury entries today are motor torts. Upon this

basis something like 14,500 of the 27,600 jury entries for 1929 would come to the Commission.

It hardly needs to be said that such a heavy annual inflow would require a large organization to equalize the outflow.

VII.

Diversion of Motor Tort Cases to District Courts.

The proposal of the Judicial Council to switch motor tort cases to the existing District and Municipal Courts—an idea not half as revolutionary as their commitment to an unborn commission—seems to meet with little favor. Perhaps that is because it is easier to see the defects in an existing institution than it is to visualize the inevitable deficiencies of an organization not in being.

However that may be, one may legitimately doubt whether the District and Municipal Courts could shoulder this flood of motor litigation. It seems very much like shifting the load from Atlas to Hercules.

VIII.

A Plan for Trying Motor Torts.

It is easy enough to tear down. The problem is to work out some system whereby the results demanded by the citizens of the State may most readily be obtained.

The following plan is suggested for consideration.

It is fundamental, in my opinion, that any plan for handling motor tort cases be built upon and around the Superior Court.

Here is a Court with a tradition, a morale, a technique, developed over a period of nearly one hundred and fifty years. Its justices, because holding office during good behavior, are as nearly removed from outside influences, from any pressure to decide from expediency rather than according to their honest convictions, as can happen to mere man. Most of them are, and the newer ones will in brief time be, experienced in weighing testimony, in appraising the witnesses. It is true that they are men—which means that they are not infallible, that they make mistakes. They are not perfect, but it does seem improbable that five, ten, or twenty men appointed to a commission even if they all be lawyers would, as a body, excel the justices, taken as a whole, in acuteness, wisdom, and probity.

We should not lightly cast the judges of the Superior Court into outer darkness. Their services in motor tort cases should be retained to the largest extent possible. The imperative need is some practical voluntary alternative to jury trial, to which the parties to motor litigation may resort if so inclined.

One must recognize the inherent weight of the arguments of those who oppose putting into the hands of a single man, even though he be denominated a judge rather than a commissioner, the duty, unaided, of deciding all questions of law and fact, including the assessment of the amount of damages.

Judges differ one from another in temperament and outlook. Some, perfectly unconsciously of course, look more kindly upon a plaintiff than upon a defendant, or vice versa; some are more liberal than others in fixing damages. All this is equally true of juries, but the latter are evanescent, dissolving into the community at the end of their term, whereas the judges continue, and thus their "slant" becomes generally known to the bar.

It would tend to prevent a judge from sinking into a rut if he had the advice of the lay mind. This can be achieved by bringing in to sit with him two laymen, an advisory jury, whose function will be to hear and weigh the evidence, and at the close of the case to advise the judge, not only as to the general liability of the defendant, but, if they or either of them, favors a finding for the plaintiff, of the amount thereof. The judge shall be free to disregard the advice, so that the responsibility for the finding shall be his alone.

These laymen advisers should be appointed by the Governor, preferably after an examination and rating by the Civil Service Commission. Their number should be small, first, because by serving fairly steadily they will become experienced in appraising the reliability of witnesses, in weighing the evidence, in awarding fair damages, and, second, because fairly regular service will attract men of the right calibre. They should receive substantial remuneration—which by no possibility could equal the aggregate payments to a jury of twelve amounting to $72 a day, not including the payments to additional jurors in attendance.

The advisers should rotate and not sit continuously with one judge for any length of time.

The hearings should be informal, and technical rules of evidence should find no welcome. The decision of the Court should be made and announced at the end of the trial, after conference

between the Court and his advisers, and before the next case is taken up.

The foregoing is obviously only a skeleton outline of the plan suggested. There needs to be added flesh and clothing. That task needs more competent hands.

The query will immediately arise as to how motor cases are going to be directed into this court.

It is not proposed that there should be any direct compulsion. Force seems both unwise and unnecessary.

Plaintiffs can bring their cases where they will, to jury, jury waived, or motor tort sessions; but if they choose a jury they must pay a jury fee, large enough to make them think but not so large as to prohibit.

The vast majority of plaintiffs will, it seems probable, resort to that branch of the Court—a judge and two laymen—which will give the speediest and most inexpensive trial. If any one prefers a jury, with the consequent delay in reaching trial, with its expensiveness, its formalities, and its rules of evidence, it is his voluntary choice. The State has done all that can be expected when it provides another and cheaper and speedier method of trial.

But will defendants allow the new division of the Court to try the cases? If there should be a State fund, it can be provided that cases brought in the motor tort division shall remain there. If insurance companies continue to insure, one can only guess what they will do. If a defendant removes a case to the jury list he, or more accurately it, must pay the jury fee. Any regular practice of removals would cost the companies a pretty penny.

Furthermore, the companies would have no particular reason for removal, and would naturally be slow to incur the ill-will which would surely arise if they acted so as to arouse the suspicion of deliberately delaying trial.

The motor owners of the Commonwealth are not averse—I take it—to compensating those who have been really injured, but they do not care to contribute to imposters.

Even under the proposed plan the justices of the Superior Court are too few to handle all this mass of litigation. It will be necessary to call in a number of the District Court judges, at least until the congested docket is cleared.

The sitting of District Court judges in the Superior Court is not an innovation. Continuously since 1923 a substantial number have been presiding over certain classes of criminal trials in the

Superior Court, by virtue of an Act of that year giving the Chief Justice of the Superior Court authority to call them up.

These lower court justices have now served for six years, to the relief of the criminal docket, and to the general satisfaction of the community, as evidenced by the fact that the Legislature has from time to time extended the operation of the law permitting them to be called in.

Their experience in their own courts is wide. They daily deal with all sorts of cases, both civil and criminal. From October 1, 1926, to October 1, 1927, 47,413 civil writs and 165,015 criminal cases were entered in the district courts.*

The competency and fairness of the great majority of the judges of those courts which come in closest contact with the people cannot be doubted.

Number of Sittings of Proposed Motor Division.

It seems desirable to give—principally as a basis for discussion—some estimate of the number of sittings to be given by the proposed motor tort division of the Superior Court. The average time taken by each trial in the Superior Court is estimated to be about one and one-third days. It would seem that a court of one judge and two advisers, conducting trial informally and confining itself to motor torts, could try an average of one and one-half cases a day. Allowing 200 court days a year, each sitting would dispose of 300 cases a year. In order to clear the docket as speedily as possible, it would be well to have at the beginning as many sittings as possible. Let us assume—bearing in mind that the assumption is more the child of desirability than of proved possibility—twenty-five sittings, each continuing for forty weeks a year. The output would be, a guess again, 7,500 cases. Such an output ought, within a few years, to bring the docket nearly up to date; and when that happens the number of sittings can be reduced.

In all this discussion, the emphasis has been laid upon motor tort jury cases. It is not to be inferred therefrom that the contract, equity, ordinary tort and jury waived cases are considered of less importance. They have equally as good a claim to consideration, but until the motor tort cases are got rid of there is little scope for other litigation.

It would seem advantageous if the Superior Court Justices should be largely confined for the present to non-motor litigation,

* Fourth Report, Judicial Council, p. 58.

so that equity and contract cases could receive prompt attention. The motor tort division should be manned by the District Court judges, with perhaps half a dozen Superior Court justices thrown in, if the phrase is permissible.

It should be kept in mind at all times that the Superior Court is sadly under-manned. While the number of civil cases entered in 1929 constituted an increase of 152% over the number entered in 1902, the increase in the bench over the same period is only 77%—from 18 to 32 justices. Even in 1902, the Court was by no means abreast of its docket. A litigant then had to wait eighteen months in Suffolk, and from fifteen to twenty-four months in Middlesex, the county with the next largest entry list. To attain even the status of 1902, there would have to be a bench of forty-five—the same 152% increase in the number of judges that there has been in the entries between 1902 and 1929.

Facts ultimately have to be faced. Thirty-two judges in 1929 cannot handle two and one-half as many cases as the eighteen judges of 1902.

IX.

Conclusion.

The plan suggested herein is manifestly not the only plan possible, more than likely it is not the best plan devisable by the wit of man, but the irritating and aggravating situation whereby plaintiffs either have to settle or else wait eight months in Franklin, two years three and one-half months in Suffolk where is centered half the entire docket of the State, and up to three years and five months in Newburyport, calls for some action, especially as the lag between date of writ and trial is certain to grow progressively longer.

Instead of half scrapping the Superior Court, it is possible that the wiser course is to scrap only its antiquated procedure, as well that compelled by statute as that imposed by the dead hand of tradition.

Dunbar F. Carpenter.

THE NEW VOLUNTARY DEFENDER'S COMMITTEE IN BOSTON.

A Committee has been organized and financed to try the experiment of a Voluntary Defender in Boston.

The Committee consists of:

RICHARD W. HALE, ESQUIRE, *Chairman,*
DANIEL J. LYNE *and*
RAYNOR M. GARDINER.

They have requested the Bar to volunteer, the general idea being that there should be a number of offers available to the Committee which can be taken up so that any specific case could be turned over to one lawyer or firm. At one period in the history of the New York Committee this form of volunteer service from the Bar was satisfactory and successful.

They have communicated to Chief Justice Hall the following memorandum and copies of it have been circulated to the courts, the District Attorney, the jail, etc.

BOSTON, SUFFOLK COUNTY, MASSACHUSETTS.

VOLUNTARY DEFENDERS COMMITTEE, 1929-30.

Through the courtesy of an anonymous donor a sum of money has been provided for Voluntary Defender work in Suffolk County, Massachusetts, with a possibility of extension to Metropolitan Boston. The experience of New York and the studies made for Philadelphia and elsewhere indicate that a full-fledged Voluntary Defenders Committee will require an office, a staff and equipment costing far more than our supply of money will run to. But it is to our advantage that the work should be carried on in an experimental way until we find out whether anything is worth doing and what is worth while.

Accordingly, it is desired that any case which seems to deserve the services of a Voluntary Defender should be referred to the Secretary of the Committee, Mr. William J. McNulty. He can be corresponded with by mail only at P. O. Box 32, North Postal Station, Boston. Arrangement may later be made for him to be seen at the Court House or at some office. Any official communication from a Judge, District Attorney or that office will be relayed to Mr.

McNulty through the switchboard of the Boston Legal Aid Society, Haymarket 5320.

As soon as any case is brought to the attention of Mr. McNulty he will investigate the matter and bring it to the attention of the Committee and he will probably be authorized to conduct the defense of the case or to arrange for having some other member of the Bar conduct the defense.

In St. Louis and Philadelphia defender organizations have been established and are functioning efficiently. In New York the Voluntary Defender Committee has expanded its work and is now handling twice as many cases as in any previous year. The Legal Aid Society of Cincinnati is at present experimenting with the voluntary defender. The majority of Legal Aid Societies endorse and encourage this work, and the subject fills an important place in the agenda of the National Association of Legal Aid Societies' Convention in Cincinnati on November 21st and 22nd. Among communities that are sponsoring the public defender at present are Los Angeles, Portland (Oregon), Omaha, Minneapolis, Pittsburgh, Memphis, Columbus, New Haven, Hartford, and Bridgeport. The Institute of Law at Johns Hopkins University is projecting a study of the present system of defense in criminal cases, and the relation of the private and public defender to that system. Obviously, at the outset the voluntary defender in Boston can handle only a few selected cases, but in time, if the results of our efforts warrant, we hope to expand our work.

RICHARD W. HALE, *Chairman*,
DANIEL J. LYNE,
RAYNOR M. GARDINER.

JUDICIAL NOTICE OF FOREIGN LAW UNDER ST. 1926 C. 168.

The opinion in *Lennon* v. *Cohen,* decided Sept. 22, 1928, Adv. Sheets, p. 1587, called forth the following comment in the "Harvard Law Review" for November, 1928, p. 130.

Note from Harvard Law Review.

EVIDENCE—JUDICIAL NOTICE—INTERPRETATION OF STATUTE REQUIRING JUDICIAL NOTICE OF FOREIGN LAW.—A statute required the courts to take judicial notice of the laws of other states. Mass. Laws 1926, c. 168. The plaintiff sued on a judgment obtained in 1927 in the supreme court of New York. A New York statute provided that an action upon a judgment rendered in a court of record of New York cannot be maintained unless ten years have elapsed since the docketing of such judgment. N. Y. C. P. A. (1921) §484. Judgment was given for the plaintiff. On appeal the defendant asked for the first time that the court take judicial notice of this statute. *Held,* that the New York statute is a statute of limitations and must be pleaded specially, and that since it was not called to the attention of the trial court it cannot be considered on appeal. Judgment affirmed. *Lennon* v. *Cohen,* Mass. Sup. Jud. Ct., decided Sept. 22, 1928.

The authorities agree that a statute of limitations must be specially pleaded. *Wall* v. *Chesapeake & O. R. R.,* 200 Ill. 66, 65 N. E. 632 (1902); *Sawyer* v. *Boston,* 144 Mass. 470, 11 N. E. 711 (1887). Also, it should lie solely in the discretion of the appellate court whether or not it will consider matters of which the trial judge should have taken judicial notice but which were not called to his attention. *Judicial Notice of Foreign Law* (1926) 11 Mass. L. Q. No. 5, at 7; Strahorn, *Process of Judicial Notice* (1928) 14 Va. L. Rev. 544, 558; *cf. Warneke* v. *Pressner,* 103 Conn. 503, 131 Atl. 25 (1925). The court may have been justified in refusing the defendant's request in the principal case since no substantive right was involved. See Note (1921) 30 Yale L. J. 855. Thus, the actual decision seems correct. However, the court proceeded . . . to interpret the state as not removing from the province of the jury the determination of foreign law. This would leave the law of Massachusetts as it was before the statute. *Electric Welding Co.* v. *Prince,* 200 Mass. 386, 86 N. E. 947 (1909). But the statute was expressly intended to change the former rule and to leave all questions of foreign law for the judge. *First Report of the Judicial Council of Massachusetts* (1925) 11 Mass. L. Q. No. 1, at 36. The sup-

posed reform had received the approbation of members of the bar and legal writers. Dodge, *Address Before American Bar Association* (1926) A. B. A. J. 582; 5 Wigmore, Evidence (2d ed. 1923) §2558; Note (1928) 37 Yale L. J. 813. A similar statute has been interpreted as achieving the desired reform. *Watkins* v. *Johnson*, 129 Ark. 384, 196 S. W. 465 (1917). And the Massachusetts court had already applied the statute properly. *Holmes* v. *Dunning*, 260 Mass. 250, 157 N. E. 358 (1927); *cf. Vogel's Case*, 257 Mass. 3, 153 N. E. 175 (1926). It is hoped that the Massachusetts courts will give the statute a liberal interpretation and thereby effectuate a sound reform.

FURTHER DISCUSSION.

There was no jury involved in the Lennon case but the court's remarks about foreign law as a "question of fact" with references to *Wylie* v. *Cotter* and *Electric Welding Co.* v. *Prince*, which were the very cases that led to the enactment of the statute, seem somewhat ambiguous in view of the previous recognition of the statute by the court referred to in the note above quoted.

The late James B. Thayer pointed out that foreign law was no more a question of fact than domestic law and that when what was wanted was "the rule or law of the case" the same sort of question is presented whether the law be domestic or foreign, and that the question should in all cases be answered by the judge.

> "The circumstance that while the domestic law does not need to be proved by evidence, strictly so-called, foreign law must be so proved, is not material. In reason the judges might well enough be allowed to inform themselves about foreign law in any manner they choose, just as the judges of the Federal Court notice without proof the laws of all the states. But if it is required to be proved, it should be proved to the judge."

PRELIMINARY TREATISE ON EVIDENCE, pp. 257–8.

Dean Wigmore supports these views. *Wigmore on Evidence*, Volume IV, Sec. 2549, 2558.

Sections 5726 and 5727 of the Connecticut General Statutes, Revision of 1918.

> "*Sec. 5726. Printed Statutes of Other States.*
>
> The public statutes of the several states and territories in the United States as printed by authority of the state or

territory exacting the same and the private or special acts of this state shall be legal evidence and the courts shall take judicial notice of them.

Sec. 5727. Reports of Judicial Discussion of Other States.

The reports of the Judicial decisions of other states and countries may be judicially noticed by the courts of this state as evidence of the common law of such states or countries and of the judicial construction of the statutes or other laws thereof." (*cf. Hale* v. *N. J. Steam Nav. Co.*, 15 Conn. 549 (1843); *Lockwood* v. *Crawford*, 18 Conn. 361 (1847).

A similar act appears in the New Jersey compiled Statutes, Vol. 2, p. 2228. For further discussion see MASSACHUSETTS LAW QUARTERLY for August, 1926-7.

We think a careful tracing of the history of the earlier Massachusetts rule that questions of law were questions of fact to be decided by a jury will show that it developed gradually as a result of misunderstanding of certain passages in opinions about a century ago. A rule thus developed can surely be changed by statute. We have not these opinions at hand at the moment but will discuss the matter further in a later issue. It would seem that a question of law, foreign or domestic, is not and never has been, except by local judicial definition, a question of fact of the character for the decision of which jury trial was provided. As pointed out by Prof. Thayer and others, it has never been the law that every question of fact which may arise in a case must be decided by a jury. The very phrase "to take judicial notice" illustrates this. A local judicial definition which discriminates between the *nature* of a question of Massachusetts law and a question of Connecticut or New York law does not seem to be beyond legislative modification by the extension of the scope of judicial notice.

F. W. G.